89-701

No. 89-

Supreme Court, U.S.
FILED
OCT 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

TUOLUMNE PARK and RECREATION DISTRICT, and FRIENDS OF SIERRA RAILROAD, INC.,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, UNITED STATES OF AMERICA, and FIBREBOARD CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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October 1989

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. May federal agencies, under the guise of "fast track" licensing procedures, abandon compliance with fundamental environmental and historic preservation laws, and insulate their unlawful conduct both from public knowledge and input and from judicial review by means of inadequate and fictional notification provisions?

2. Did the court of appeals err in holding that the 60-day time period provided under 28 U.S.C. § 2344 for seeking judicial review of an order of the Interstate Commerce Commission is applicable and runs from the date of a *Federal Register* notice when (a) mere *Federal Register* notice is inadequate and unlawful under binding regulations of the Council on Environmental Quality interpreting the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, et seq., and is inconsistent with equally applicable regulations of the Advisory Council on Historic Preservation (ACHP) interpreting section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f; (b) the parties seeking judicial review complained of violations of NEPA and NHPA, which violations are clear and admitted, and which constituted a total failure by ICC to do anything to comply with either statute; and (c) the parties seeking judicial review did *not* have actual notice of the agency action, nor reasonable access to the *Federal Register*, nor any reasonable opportunity to raise issues before the agency, nor any non-fictional opportunity even simply to seek enforcement of NEPA and NHPA?

3. Are petitioners Tuolumne Park and Recreation District and Friends of Sierra Railroad denied due process of law, in violation of the Fifth Amendment of the United States Constitution, through a "constructive" notice procedure virtually guaranteed *not* to reach parties affected by agency action in time to allow them either to

exercise rights in front of the agency or to obtain judicial review of clearly unlawful agency actions?

4. Did the court of appeals err in holding that this Court's decision in *ICC v. Brotherhood of Steam Locomotive Engineers*, 482 U.S. 270 (1987), applies to cut off any meaningful judicial review of agency action even when, because of manifest lack of notice to interested persons, the only realistic means to present an issue to the agency is on a petition for reconsideration or to reopen, and the agency refuses to do anything?

PARTIES TO THE PROCEEDING

The parties are:

Petitioners:

Tuolumne Park and Recreation District and Friends of Sierra Railroad, Inc.

Respondents:

Interstate Commerce Commission, United States and Fibreboard Corporation.

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INTERSTATE COMMERCE COMMISSION,
UNITED STATES OF AMERICA, and
FIBREBOARD CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners, Tuolumne Park and Recreation District and Friends of Sierra Railroad, Inc., respectfully pray that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decision of the court of appeals below is reported at 881 F.2d 663 (July 31, 1989). The decisions of the Interstate Commerce Commission (ICC) are unreported. All decisions are set forth in the appendix.

JURISDICTION OF THIS COURT

The decision and judgment of the court of appeals from which this petition is taken was entered on July 31, 1989. Pursuant to 28 U.S.C. § 2101(c), petitions for a writ of certiorari may be filed within ninety days after

entry of judgment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The following constitutional provisions, statutes and regulations, all set forth in the appendix, are involved in this case: (1) the Due Process Clause of the Fifth Amendment of the United States Constitution; (2) section 102 of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332; (3) section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f; (4) various provisions of the Revised Interstate Commerce Act, including 49 U.S.C. §§ 10905-06; (5) various regulations of ICC, including especially 49 C.F.R. § 1152.50 (1985); and (6) various regulations of the Council on Environmental Quality (CEQ), including especially 40 C.F.R. § 1506.6.

STATEMENT OF THE CASE

This proceeding, arising out of a railroad abandonment case before the ICC, presents questions of nationwide, and government-wide, importance relating to how far federal agencies may go in avoiding any compliance whatsoever with the Nation's environmental and historic preservation laws through so-called "fast track" licensing procedures. In this case, the fast-track procedure involved manifestly deficient provisions for public notice combined with non-existent review of environmental and historic resource impacts. Local agencies and preservational groups, including petitioners, interested in avoiding adverse environmental and historic resource impacts were totally deprived of rights guaranteed by federal law.

A. Statutory background.

ICC regulates railroad abandonments. Rail lines moving freight in interstate commerce in general may not be abandoned nor may service be discontinued without

ICC approval.[1] Congress has adopted an elaborate regime providing for public notice of proposed abandonments, and an opportunity to be heard, before the ICC acts. 49 U.S.C. § 10904. This notice includes publication of lines for which abandonment is imminent in a "system diagram map," [2] wide dissemination of a "notice of intent" to file an abandonment application,[3] newspaper notification for at least three weeks in advance of filing of an abandonment application,[4] posting of the "notice of intent" at stations,[5] and provision of 30 days in which to comment *before* the agency acts.[6]

Most rail abandonments, however, are no longer governed by these "statutory" notice procedures. To the contrary, two-thirds to three quarters of all abandonments are now governed by "exemption" procedures.[7]

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[1] 49 U.S.C. § 10903(a)(1).

[2] 49 U.S.C. § 10904(e)(3).

[3] *Id.* (a)(3).

[4] *Id.* (a)(3)(C).

[5] *Id.* (a)(3)(B).

[6] *Id.* (b).

[7] Data from ICC's 1988 Annual Report (p. 129) indicates as follows:

	FY 1986	FY 1987	FY 1988
abandonment applications—filed	141	60	50
granted	117	60	47
notices of exemption—filed	93	73	46
granted	56	88	43
petitions for exemption—filed	30	50	84
granted	43	27	71
percentage "exemptions"—filed	47%	67%	72%
granted	46%	66%	71%

The fact that most abandonments are now "fast-tracked" underscores the importance of assuring that environmental and historic resource requirements are not ignored in the process.

More specifically, Congress has afforded ICC authority to exempt certain transactions or classes of transactions from full regulation. 49 U.S.C. § 10505. ICC has exercised this "exemption" authority in the context of rail abandonments in several ways. For example, the agency frequently grants "petitions for exemption" on a case-by-case basis, and has also issued "class exemptions." The "exemptions" do not exclude the action from ICC review; rather, they "fast-track" that review by cutting down on the economic data which must be supplied.

One of the most heavily-used class exemptions in the rail abandonment area is the class exemption for lines not used for local traffic for two years. That regulation is codified at 49 C.F.R. § 1152.50. Under that regulation, a qualifying carrier files a "notice of exemption" with the ICC. In contrast to the notice required by 49 U.S.C. § 10904, there is no notice to the public, including local communities. Within 20 days, ICC publishes in the *Federal Register* a brief "notice of exemption"—in effect approving the abandonment without any prior right to be heard on the part of affected members of the public. The notice contains no environmental information. Any interested member of the public has only ten days from *Federal Register* publication in which to discover the Commission's action and to seek a stay; and twenty days from *Federal Register* publication in which to petition for reconsideration. No other notice to the public and no other remedies to the public are afforded.

It is established beyond doubt that the requirements of section 102 of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332, apply to ICC abandonment

proceedings,[8] as do the requirements of section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470f.[9] ICC expressly admits that, under 49 U.S.C. § 10505, it lacks power to exempt rail abandonments governed by 49 U.S.C. § 1152.50 from these "environmental" review obligations.[10] Under these circumstances, the agency in order to comply with NEPA § 102 and NHPA § 106 must consider the impact of each abandonment governed by 49 C.F.R. § 1152.50 upon the environment, including historic resources.

Under regulations of the Council on Environmental Quality (CEQ), binding upon all federal agencies,[11] regulatory bodies such as ICC must "[m]ake diligent efforts to involve the public" in NEPA related matters (i.e., rail abandonments). 40 C.F.R. § 1506.6(a). Notice in the *Federal Register*, standing alone, is insufficient under the CEQ regulation even for actions of nationwide application,[12] much less for matters of local application, such as most rail abandonments.[13] Likewise, under binding[14] regulations of the Advisory Council on Historic Preservation (ACHP), the ICC has an affirmative obligation to

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[8] *Harlem Valley Transp. Ass'n v. Stafford*, 500 F.2d 328, 336 (2d Cir. 1974). *See also Aberdeen & Rockfish R. Co. v. SCRAP*, 422 U.S. 289 (1975) (*SCRAP I*) (NEPA applies to rail regulatory proceedings).

[9] *Illinois Commerce Commission v. ICC*, 848 F.2d 1246, 1261 (D.C. Cir. 1988) (*ICC II*).

[10] 366 ICC at 890 & n. 10 (ICC lacks authority to exempt rail abandonments from "relevant energy and environmental acts").

[11] *Andrus v. Sierra Club*, 442 U.S. 347, 357 (1979); *The Steamboaters v. FERC*, 759 F.2d 1382, 1392-93 (9th Cir. 1985).

[12] 40 C.F.R. § 1506.6(b)(1)-(2).

[13] 40 C.F.R. § 1506.6(b)(3); 46 Fed. Reg. 18037 (1981).

[14] 16 U.S.C.§ 470s; *National Center for Preservation Law v. Landrieu*, 496 F. Supp. 716, 742 (D.S.C.), *aff'd*, 635 F.2d 324 (4th Cir. 1980).

notify persons and parties known to be interested in an "undertaking" (including licensing actions) at each stage in the process of assessing the effect of the proposed undertaking on historic properties. *See* 36 C.F.R. §§ 800.4(d) and 800.5(b), (e)(1) & (e)(3).

B. Sierra Railroad Abandonment.

The Sierra Railroad has been determined historic and eligible for the National Register of Historic Places by the California State Historic Resources Commission (CSHRC).[15] Originally constructed to serve the gold mining and timber industries in the southern portion of California's "Mother Lode" during California's "second gold rush," [16] the railroad also served in the construction of the dam in the Hetch Hetchy Canyon of Yosemite National Park.[17] Scenic and traversing areas of natural beauty, the line has been employed in many movies and television productions.[18] A state historic park, Railtown 1897, is located adjacent to it.[19] In 1981, in a finding reiterated again in 1987, CSHRC unanimously determined that the Sierra Railroad was "the most intact historic short line railroad in California." [20]

In 1981, the ICC, authorized the abandonment of the line from milepost 50.0 to milepost 56.2 (termed milepost 57.2 in ICC's decision) in Tuolumne City in Tuolumne

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[15] Staff Evaluation of August 7, 1981, reiterated February 6, 1987. *See* Petitioners' Opening Brief, below, Exhibit E; reprinted as an appendix to this Petition.

[16] *See* D. Deane, *Sierra Railway* (1960) (L/C 60-15643).

[17] *Id.* 131; T. Wurm, *Hetch-Hetchy and Its Dam Railroad* 58, 59, 67 & 86 (1973) (L/C 73-87231).

[18] D. Deane, *supra*, at 152-54; L. Jensen, *The Movie Railroads* 5, 14-69, 213-20 (1981) (ISBN 0-933506-05-8).

[19] Pro se Petition to Implement Section 106 Review, dated June 18, 1986, before the ICC, below, at 4.

[20] *See* note 15 *supra*.

County, California.[21] In its order permitting termination of common carrier freight service, the Commission noted expressions of interest in preserving the line because of its nature as an important historic resource. In particular, the Commission explained that

> Friends of the Sierra Railroad . . . and several Tuolumne County residents, a merchants association and the historical society have filed petitions requesting that we consider the historic significance of the route between Stanislaus and Tuolumne, CA. The petitions chronicle the rich history of Sierra, and argue that the historic integrity of the line will be jeopardized by this [abandonment] proposal. The line has been proposed for listing in the National Register of Historic Places, and for that purpose, they point out, the entire line must be maintained intact. . . .[22]

Because the abandoning freight carrier had agreed to hold the line available for a period of time for preservational purposes,[23] the Commission nevertheless authorized the abandonment subject to revocation if the segment involved was not in fact made available for historic preservation. The remainder of the line (mileposts 0.0 to 50.0) was transferred to a new owner for continued freight rail operations, with the seller reserving rights to operate passenger and movie train services. Negotiations for acquisition of the line from milepost 50.0 to 56.2 for historic and excursion purposes proceeded, first with Friends of Sierra Railroad (one of the petitioners herein) and then with petitioner Tuolumne Park and Recreation District. The District ultimately purchased this portion of the line, including all track, ties, and structures, for continued railroad use. The District intends to preserve the historic railroad, to develop an excursion service to

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[21] 46 Fed. Reg. 22060 (April 15, 1981).

[22] 46 Fed. Reg. 22060-61 (April 15, 1981).

[23] *Id.* 22061.

complement the area's tourist economy, and to stimulate further movie and television use of the area. ICC staff advised preservation advocates that they would receive notice in the event of further proceedings in the matter.

Unbeknownst to the District, Friends of Sierra Railroad, or, so far as the record shows, any person or agency in Tuolumne County, Sierra Railroad filed a "notice of exemption" with the ICC in late 1984 for mileposts 49 to 50, invoking that agency's "fast track" rail abandonment procedure in 49 C.F.R. § 1152.50. Pursuant to § 1152.50, the Commission, approximately a month later, without any public notice or opportunity for comment, granted the exemption, publishing a brief notice to this effect in the January 2, 1985, *Federal Register*.[24] It is undisputed that this is the only "notice" which ICC afforded to the citizens of Tuolumne County, including those manifestly interested in the corridor, and it is equally undisputed that the nearest *Federal Register* was (and evidently still is) at least one hour's drive from the County.[25] In the situation here, the "notice" could as well have been published in the *London Times*, or in *Pravda* or *Izvestia*. Any would have been as likely to inform the interested public. Neither the Park District, nor Friends, nor any related entity, nor—so far as petitioners can tell—any representative of any organization or agency in Tuolumne County, received any actual notice of the abandonment authorization.[26]

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[24] 50 Fed. Reg. 180 (Jan. 2, 1985). Pacific Gas & Electric, a utility, evidently also was unaware of the notice, but filed a belated petition for reconsideration on February 21, 1985, approximately one month out-of-time. This petition was dismissed by ICC on October 4, 1985, in an unreported and unpublished decision after the parties amicably settled their differences. Judge Wallace, in his rendition of the facts, thus incorrectly states that there were "no objections" filed. 881 F.2d at 665.

[25] 881 F.2d at 667.

[26] ICC does claim to have served copies of its decision upon certain state offices. If so, this is highly unusual for decisions under

The lack of any adequate notice exacerbated a key failing below: the lack of any compliance with NEPA or NHPA whatsoever. In contrast to its handling of the line from milepost 50 to 56.2 in 1981, and in the face of its public acknowledgement of the historic significance of the entire line at that time, ICC at no point before or after granting the abandonment authorization for mileposts 49 to 50 did anything to comply with either section 106 of the NHPA (which requires ICC to consider the impact of its action on historic resources and to consult with the Advisory Council on Historic Preservation), or section 102 of NEPA (which requires ICC to consider the environmental and historic preservation impacts of its actions).[27] As it happens, an historic building, namely the Standard Railroad Depot, is virtually in the center of the line from mileposts 49.0 to 50.0 and access to the area of the Depot is necessary for a logical terminus and staging area on a county road for excursion use of the line.[28]

When, roughly a year later, local residents and officials discovered, as a result of some destruction of tracks, that

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49 C.F.R. § 1152.50, and ICC appears to have abandoned the practice. In any event, notice to state agencies is manifestly inadequate here. As noted by the D.C. Circuit in *Illinois Commerce Commission v. ICC*, 848 F.2d 1246, 1260 (1988), "[t]he Commission . . . does not advance any evidence that state public service agencies will [notify interested local and environmental groups], and, in fact, the Commission's own staff in comments concerning another exemption proceeding suggest that state agencies do not carry out this function very well. 'The designated agency . . . cannot circulate the environmental notice quickly enough to afford any meaningful opportunities for involvement in the ICC's decisionmaking process.' Comments of the Section of Energy and Environment on Class Exemption for the Construction of Connecting Tracks under 49 U.S.C. § 10901."

[27] Letter, Thomas King (Advisory Council on Historic Preservation) to Carl Bausch (ICC), Jan. 30, 1986; Letter, Carl Bausch (ICC) to Thomas King (ACHP), Feb. 13, 1986 (Appendix D).

[28] *See* Friends of Sierra Railroad and Tuolumne Park and Recreation District opening brief, below, at pp. 16-17 (map).

an abandonment authorization for mileposts 49.0 to 50.0 had been granted, the period for petitioning ICC for a stay (ten days) or reconsideration (20 days) under 49 C.F.R. § 1152.50 had long since passed.[29] They nevertheless promptly communicated with ICC.[30] Similarly, the Advisory Council on Historic Preservation wrote ICC requesting compliance with section 106 of the NHPA,[31] as did the California State Historic Preservation Officer.[32] The Chief of ICC's Section on Energy and Environment admitted that the agency had acted oblivious to the applicability of section 106 of the NHPA,[33] and indicated that ICC was seeking the cooperation of the railroad in "voluntarily" complying.

"Voluntarism" unfortunately did not work. The railroad sold the line from mileposts 49.0 to 50.0 to Louisiana Pacific Corporation (now Fibreboard Corporation)

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[29] In actuality, even if the petitioners had known of the abandonment authorization, ICC procedures then applicable would have been meaningless to vindicate "environmental" interests. ICC required extensive showings to obtain a stay, such showings would be impossible in ten days even with notice, and as a practical matter the agency *never* granted a stay in "environmental" cases, notwithstanding unresolved "environmental" issues. Absent a stay, the abandonment would become effective (i.e., ICC would have taken action) rendering environmental review subsequent and thus meaningless. Further, the agency would then take the position that it had lost jurisdiction to afford substantive relief.

[30] *E.g.*, Letter, Mr. Cassasa (FSR) to Mr. Maestro (ICC), April 21, 1986.

[31] Letter, Thomas King (ACHP) to Carl Bausch (ICC), Jan. 30, 1986 (Appendix D).

[32] Letter, Ms. Gualtieri (Cal. SHPO) to Mr. Carl Bausch (ICC), Feb. 14, 1986.

[33] Letter, Carl Bausch (ICC) to Thomas King (ACHP), Feb. 13, 1986 (Appendix D). ICC's Director of Governmental Affairs made a similar admission in response to congressional inquiry. Letter, B. Gordon (ICC) to Rep. Lehman, Aug. 14, 1986.

by quitclaim deed recorded on June 18, 1986.[34] On the same day Friends of Sierra Railroad petitioned ICC for compliance with section 106 of the NHPA. This petition was later joined in by the Tuolumne Park and Recreation District, as well as supplemented.

ICC initially did nothing. On February 26, 1987, Friends of Sierra Railroad filed a complaint in the U.S. District Court for the District of Columbia to compel compliance with the applicable statute.[35] On the basis of *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) and *Oil, Chemical and Atomic Workers v. Zegler*, 768 F.2d 1480, 1483 (D.C. Cir. 1985) (holding that for all cases reviewable in the court of appeals, all ancillary remedies lie in the appellate court as well), this action was voluntarily dismissed on March 26, 1987, and a petition for review of the agency's inaction was filed on the same date in the D.C. Circuit.[36] Friends filed a motion for summary disposition on May 8, 1987.

Before the D.C. Circuit acted, ICC, in an unpublished decision served July 20, 1987,[37] denied Friends of Sierra Railroad and the Park District any relief. The D.C. Circuit case was dismissed on the basis of ICC's argument of July 21, contending that review would now lie from the agency decision of July 20.

Friends of Sierra Railroad and the Park District filed, with ICC, a motion to correct what they regarded as mis-

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[34] Fibreboard owns a lumber mill in the sector encompassing roughly mileposts 49 to 49.5 and is evidently adamantly opposed to any form of public use of any portion of mileposts 49 to 50, even for rail transport purposes. Such use has historically occurred, of course, for well over three quarters of a century.

[35] D.D.C. No. 87-0520.

[36] D.C. Cir. No. 87-1134.

[37] A copy of this decision is reproduced in the appendix.

statements in the agency's July 20 decision.[38] In addition, Friends and the Park District filed a timely petition for judicial review in the Ninth Circuit under 28 U.S.C. § 2344 on September 2, 1987.[39] The petition for review was held in abeyance, pending resolution by ICC of the motion to correct. ICC treated the latter motion as one for reconsideration, and denied it in another unpublished decision served on January 26, 1988.[40]

In a decision issued July 31, 1989, the Court of Appeals for the Ninth Circuit, per Circuit Judge Wallace, denied the petition for review filed by Friends of Sierra Railroad and the Park District on the procedural ground that the court was without jurisdiction to hear the merits of petitioners' legal claims. Although the petition for review was filed within 60 days of ICC's refusal to comply with NHPA and NEPA, Judge Wallace held that the court lacked jurisdiction because the proceeding was not commenced within 60 days of the January 2, 1985 *Federal Register* notice, even though the inadequacy of *Federal Register* notice was part and parcel of the complaint of petitioners in the first place. Judge Wallace held in essence that the legal fiction of constructive notice in the *Federal Register* is in all cases binding on parties affected by federal agency actions, and serves to cut off their rights before the agencies and in the courts. Judge Wallace reasoned that judicial review of ICC's subsequent refusal to comply with environmental statutes was barred this Court's decision in *ICC v. Brotherhood of*

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[38] Friends complained in particular that the Commission mistakenly intimated it was not interested in invoking § 10905; erroneously asserted, without any substantiation whatsoever, that Friends had "actual" notice; and made the Orwellian claim that Friends and the Park District had "slept on their rights" when the true sleepers were at the Commission.

[39] Pursuant to 28 U.S.C. § 2321, review of ICC orders such as those involved here is covered by 28 U.S.C. §§ 2341, et seq.

[40] A copy of this decision is also set forth in the appendix.

Steam Locomotive Engineers, 482 U.S. 270 (1987), a decision which limits judicial review of agency refusals of petitions to reopen fully litigated administrative proceedings made by parties to those proceedings. The decision in effect insulates illegal and deficient "fast track" licensing procedures from judicial review, so long as they are coupled with illegal, deficient and fictional notice. It authorizes government to play "catch me if you can" rather than to comply with the public disclosure and participation requirements that are the heart of NEPA and NHPA.

The Tuolumne Park and Recreation District and Friends of Sierra Railroad timely petitioned for certiorari.

REASONS FOR GRANTING THE WRIT

I. Constructive Notice as Provided Here Violated Petitioners' Due Process Rights.

There can be no doubt that petitioners Tuolumne Park and Recreation District and Friends of Sierra Railroad have an interest in preserving an historic resource sufficient to warrant protection by at least the rudiments of procedural due process in an ICC railroad regulatory proceeding. That much was established in *Aberdeen & Rockfish R. Co. v. Students Challenging Regulatory Agency Procedures (S.C.R.A.P.)*, 412 U.S. 669, 685-88 (1973) (*SCRAP I*), which held that an organization alleging various "environmental" injuries had standing to litigate against the ICC. But in addition to their general environmental interest, the Park District and Friends enjoy rights to acquire the segment in question under 49 U.S.C. § 10905 and, for that matter, certain rights under 49 U.S.C. § 10906 as well, for continued rail use and for public purposes, respectively. In short, the Park District and Friends were deprived of substantive as well as procedural rights, and if procedural rights had

been accorded, substantive "events on the ground" would have been different: an historic resource and public amenity would have been preserved.

One of the rudimentary precepts—indeed, the most basic precept—of procedural due process is adequate and timely notice of an opportunity for a meaningful hearing.

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. . . . The notice must be of such nature as to convey the required information . . . , and it must afford a reasonable time for those interested to make their appearance.

Mullane v. Central Hanover Bank, 339 U.S. 306, 314 (1950). *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985); *International House v. NLRB*, 676 F.2d 906, 911 (2d Cir. 1982).

The only notice afforded below to the public, including Tuolumne Park and Recreation District and Friends of Sierra Railroad, was a brief notice, published in the *Federal Register*. As noted in the statement of the case, the *Federal Register* is not even received in Tuolumne County, and the Ninth Circuit (based on representations by intervenor Fibreboard) found that the nearest *Register* was an hour's drive away.

Federal Register notice is generally adequate notice of matters which have a national, regional, or even statewide impact, because the *Register* is monitored by at least some state agencies, by industry trade associations and major corporations, and by national environmental groups. However, the notice published in this case related to an action which was very local in impact—the abandonment of approximately one-mile of railroad right-of-way in a rural county in California. Rural coun-

ties, their agencies, and their populace lack the resources to monitor the *Register*, let alone on a daily basis. The inadequacy of the notice is further compounded by the incredibly brief period afforded for seeking critical relief (namely, a stay)—a mere ten days from the date of publication under § 1152.50.

As Justice Jackson said in *Mullane v. Central Hanover Bank, supra*, 339 U.S. at 315, "[i]t would be idle to pretend that publication alone as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are [at issue]." In *Mullane*, this Court struck down as affording inadequate notice a state statute providing for "constructive notice" by way of four weeks' publication in a local newspaper. The *Federal Register* notice, upon which ICC and the Ninth Circuit relied for purposes of foreclosing all rights putatively enjoyed by Tuolumne County's agencies and citizens under NEPA, NHPA, and the Revised Interstate Commerce Act itself, is for purposes here far less effective notice than the notice by publication disapproved by this Court in *Mullane*. Indeed, the Director of ICC's Office of Transportation Analysis explained, with specific reference to this case, that

> It is axiomatic in the law that notice must be of such nature as reasonably to convey the required information. *See Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314 (1951). This principle applies equally to the administrative process. The notice procedures adopted by the ICC for abandonment exemption proceedings *are not of such nature*, especially as those procedures apply to the environmental process, including National Historic Preservation Act compliance. . . . .[41]

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[41] Memorandum, W.R. Southard (ICC OTA) to D. Shaw (ICC OP), July 31, 1986 (emphasis added) (reprinted in Appendix D to this Petition).

There is a certain irony here. The Federal Register Act, 49 Stat. 500 (1935), was adopted to require filing and publication of agency orders and regulations in order to prevent government by secret fiat after this Court's critique of such disorder in *Panama Refining Company v. Ryan*, 293 U.S. 388 (1935). *See* L. Jaffe & N. Nathanson, *Administrative Law* 63 n.* (3d ed. 1968). The Act was not intended to permit federal agencies to deprive local government agencies or citizens of their federal rights and remedies by converting notice into an inevitable legal fiction. In any event, "when notice is a person's due, process which is a mere gesture is not due process." *Mullane v. Central Hanover Bank, supra*, 339 U.S. at 315.

The doctrine of foreclosing rights on the basis of constructive notice is harsh, and resort to it is reluctant. *See Amoco Production Company v. United States*, 619 F.2d 1383 (10th Cir. 1980). While "constructive notice" in the *Federal Register* is frequently held valid against a regulated industry (on the very plausible assumption that it is the industry's business to monitor applicable regulation), such notice is not talismanic as applied to the general public. For example, in *Allison v. Block*, 723 F.2d 631, 634-36 (8th Cir. 1983), and *Matzke v. Block*, 732 F.2d 799, 802 (10th Cir. 1984), the courts of appeal found similar such "constructive notice" of the availability of federal remedies inadequate. Constructive notice in the *Federal Register* is, as applied here, a legal fiction. As Judge Posner has pointed out, "for more than 200 years we have been told that the proper office of legal fictions is to prevent, rather than to create, injustices." *United States v. Markgraf*, 736 F.2d 1179, 1187 (7th Cir. 1984) (dissenting opinion), *cert. dismissed per Rule 53*, 469 U.S. 1199 (1985), citing 3 Blackstone, Commentaries on the Laws of England 43 (1768). It is not much consolation to tell some part-time park commissioners, or an interested gas station owner or cafe-

teria operator in Tuolumne County, that he or she ought to drive an hour to study the *Federal Register* every day; again to quote Judge Posner, "it is the kind of response that breeds popular disrespect for law." 736 F.2d at 1187.

II. ICC May Not Use Accelerated Abandonment Procedures to Avoid Compliance with Mandatory Environmental Review Statutes Such as NEPA and NHPA.

Congress has made extensive provision for notice in rail abandonment proceedings. These notice provisions, if followed, are adequate to alert interested local individuals, groups and agencies, including environmental and preservation interests. In particular, 49 U.S.C. § 10904(e)(3) operates to require at least four months' pre-notification that an abandonment may be sought. And 49 U.S.C. § 10904(a)(3) requires a rail carrier seeking authorization to abandon a line to provide personal notice of a proposed abandonment to state officials and to shippers as well as comprehensive local notice to the affected local public. Focussing on the notice due the public, the statute specifically requires the carrier, among other things, to post a copy of a notice of intent in each terminal and station on the portion of line to be abandoned, and to "publish a copy of the notice for 3 consecutive weeks in a newspaper of general circulation in each county in which each . . . portion [of line to be abandoned] is located. . . ." 49 U.S.C. § 10904(a)(3)(C) & (D). In sum, Congress provided that ICC rail abandonment proceedings should be heralded by more than an after-the-fact announcement in the *Federal Register*. Yet that was all that the public, including local agencies, received here.

In 1983, ICC, purportedly acting under the authority of 49 U.S.C. § 10505, adopted a regulation, codified at 49 C.F.R. § 1152.50, which eliminated all notice by the carrier other than by mail to the chief executive officer of the state involved. In its place, ICC substituted after-

the-fact notification of the abandonment authorization, by publication in the *Federal Register*. Under legal challenge by a group of state transportation officials and labor groups, the agency's so-called "two-year out-of-service" exemption regulation was remanded in *Illinois Commerce Commission v. ICC*, 787 F.2d 616 (D.C. Cir. 1986) (*ICC I*). On remand, ICC without further notice and comment re-adopted its regulation. The re-adopted regulation was again challenged by two state transportation regulatory agencies and by labor. In addition, three "environmental" groups petitioned for review, noting that ICC has adopted 49 C.F.R. § 1152.50 without compliance with the National Environmental Policy Act (NEPA). In particular, the agency had never prepared an "environmental assessment," much less an "environmental impact statement" as required by NEPA and binding regulations of the Council on Environmental Quality for the regulation. Further, the environmental groups complained that, under § 1152.50, ICC did not independently evaluate the impact of its actions on environmental concerns and historic resources;[42] the agency unlawfully "relied" on "intervenors" to raise such concerns;[43] and the agency allowed its abandonment authorizations to become fully effective without any environmental or historic resource assessments.[44]

In order to sustain its regulation, the agency agreed, in its Brief and at oral argument, independently to assess the environmental impacts of its actions and automatically to stay the effectiveness of abandonments until compliance was had with NEPA and NHPA. The court of appeals for the District of Columbia held that but for these concessions the regulation would have again faced remand, *ICC II*, 848 F.2d at 1260. The court indicated

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[42] *ICC II*, 848 F.2d at 1258 & n.23.

[43] *Id.* at 1258.

[44] *Id.*, 848 F.2d at 1259-60.

that even with these concessions, the regulation may not be sufficient to withstand review in particular instances absent more from ICC. 848 F.2d at 1260 (special circumstances may render regulatory provisions unreasonable). The court admonished ICC that it could not delegate to parties and intervenors its own responsibility to investigate and assess the environmental impacts of proposals before it. *Id.* at 1258.[45]

The proceedings before ICC in the instant case unequivocally exhibit *all* the above infirmities with ICC's procedures under § 1152.50: there was *no* evaluation of environmental impacts or impacts on historic resources below, independently by the agency or otherwise, and not even an attempt by the agency to prepare any sort of environmental or historic resource assessment. The agency relied wholly on "intervenors" to raise the issues, but with a twist: The agency failed even to give any notice adequate to alert "intervenors" that they had to raise the issues or risk foreclosure, and the time for raising the issues would have been inadequate anyway.

ICC admits it cannot exempt itself and rail abandonments from NEPA or NHPA under 49 U.S.C. § 10505.[46] Yet NEPA and NHPA require effective notice. More specifically, ICC's proceeding below under 49 C.F.R. § 1152.50 violates binding[47] regulations issued by the Council on Environmental Quality. 40 C.F.R. § 1506.6 calls for facilitation of public involvement (*see also Trustees for Alaska, supra*, 806 F.2d at 1383) and specifies the minimum notice required. *Federal Register* notice, standing alone, is inadequate even for actions of national significance when they may affect environmental

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[45] The "environmental" petitioners in *ICC II* did not seek certiorari. This Court denied certiorari from *ICC II* when sought by the state and labor groups. *See* 109 S.Ct. 783 (1989).

[46] 366 ICC at 890 & n.10.

[47] *E.g., Trustees for Alaska v. Hodel*, 806 F.2d 1378, 1382 (9th Cir. 1986); 43 Fed. Reg. 55978 (1978).

concerns. 40 C.F.R. § 1506.6(b)(1) requires notice also to potentially interested representative groups, a list of whom each agency is supposed to maintain. Further, each agency is required to notify personally any person who requests to be notified. Finally, for proposed actions of local impact, the agency is given a choice of possible means of affording notice, including newspaper publication and personal notice, but not notice limited to the *Federal Register*.

The notice afforded by ICC in the proceeding below fell far short of ICC's obligations under NEPA, violating the binding CEQ regulation in at least two ways. First, although the proposed action was of local impact, the agency violated 40 C.F.R. § 1506.6(b)(1) by failing to afford any notice adequate to reach the county and instead by relying upon a notice procedure which was arguably inadequate even for a regulation of national scope. 46 Fed. Reg. 18037 (1981) (CEQ expressly declares such notice "a violation of the regulations"). Second, ICC, in the earlier abandonment proceeding involving mileposts 50 to 56.2 in 1981-82, had pledged to notify locally interested parties of any actions affecting the line. The agency of course did not, and this violated 40 C.F.R. § 1506.6(b)(1). *See Northwest Coalition for Alternatives to Pesticides v. Lyng*, 844 F.2d 588, 595 (9th Cir. 1988) (agency violates § 1506.6(b)(1) in similar situation).

Likewise, the regulations of the ACHP implementing the NHPA require public notice and involvement far beyond what was afforded here. ICC flatly violated requirements like 36 C.F.R. § 800.5(b) in its non-notification below.

In short, the *Federal Register* notice violated the requirements of NEPA and NHPA in this particular proceeding and was beyond ICC's authority. It is the epitome of circularity, and a true "Catch-22," to hold, as the Ninth Circuit in effect did below, that an agency can foreclose challenges to its compliance by adopting ac-

celerated "fast track" procedures which, themselves, violate NEPA and NHPA guarantees of public notice. If the Ninth Circuit is correct, then review of inadequate notices is effectively foreclosed, and little is left of due process guarantees and concepts of fundamental fairness, at least where federal agencies are concerned.

This raises a related point on the *Federal Register* notice afforded below. The court of appeals for the District of Columbia indicated in *Illinois Commerce Commission v. ICC*, 848 F.2d at 1258, that failure independently to evaluate the impact of its actions on environmental concerns, reliance on "intervenors," and allowance of abandonment authorizations to become effective without a meaningful resolution of environmental and historic preservation concerns violated the law, and would be subject to remand. That of course is the customary result when an agency clearly violates NEPA and NHPA as occurred below. *E.g.*, *LaFlamme v. FERC*, 852 F.2d 389 (9th Cir. 1988) (license suspended pending NEPA compliance); *WATCH v. Harris*, 603 F.2d 310, 325-26 (2d Cir. 1979) (pending compliance with NHPA). Yet exactly these deficiencies applied to the proceeding at the ICC below. When Tuolumne Park and Recreation District and Friends and Sierra Railroad sought corrective action, which they did with all reasonable speed once they ascertained what was happening, the ICC simply refused to do anything and the court of appeals held that it was without jurisdiction. The Ninth Circuit's failure to remand the instant case to the agency in the face of all these deficiencies amounts to a conflict with the D.C. Circuit's holdings in its second *Illinois Commerce Commission v. ICC* decision.

III. The Ninth Circuit Misapplied This Court's Decision in *ICC v. Brotherhood of Steam Locomotive Engineers*.

The Ninth Circuit in its decision below also found that its jurisdiction to entertain the petition for review filed by Tuolumne Park and Recreation District and Friends

of Sierra Railroad was foreclosed by this Court's decision in *ICC v. Brotherhood of Steam Locomotive Engineers*, 482 U.S. 270 (1987). In the latter case, this Court held that parties who did not timely petition for review from final orders in litigated ICC proceedings could not obtain belated judicial review on the basis of agency denial of administrative petitions to reopen, when those petitions in turn were based solely on "material error" that could have been presented to the agency in the first instance.

The Ninth Circuit's construction of *Brotherhood of Steam Locomotive Engineers* is clearly in error. *First*, the holding in *Brotherhood* applies where the "error" could have been presented to the agency in the first instance. Here due to inadequate notice and inadequate ICC procedures (no independent review of environmental impacts, no stay of a decision pending resolution, and so on), there was no meaningful opportunity to approach the agency in the first instance. In extending *Brotherhood* to this kind of situation, the Ninth Circuit is essentially holding that it cannot review agency decisions to refuse any relief even in the face of clear violations of law. Surely this Court never intended to deprive interested parties of at least one reasonably fair shot at asserting and defending their rights in federal agency regulatory proceedings. Surely this Court never intended to open a loophole permitting federal agencies power to evade NEPA and NHPA wholesale without fear of any effective judicial review.

Second, ICC's own regulations do not simply authorize but require reopening here. ICC stated in its Brief in the Ninth Circuit below (ICC Brief at P. 30 n.30), "Congress expected for the exemption power [under 49 U.S.C. § 10505] to be used with after-the-fact review to correct abuses," citing Conf. Rep. No. 1430, 96th Cong., 2d Sess. at 105 (1980). The D.C. Circuit made the same observation in *Illinois Commerce Commission v. ICC*, *supra*, 848 F.2d at 1248-49 n. 2. It is accordingly not surprising that

49 C.F.R. § 1152.50 declares on its face that a notice of exemption is void *ab initio* if it is based on false or misleading information. The idea behind an abandonment authorization via 49 C.F.R. § 1152.50, is that it will be granted *ex parte* and expeditiously, but that mistakes will be corrected after the fact by voiding the § 1152.50 authorization.

In its filing with the ICC, the abandoning rail carrier stated that the mile of right-of-way in question was not suitable for public use. That is manifestly incorrect. The entire line, including the mile at issue, had previously been determined historic. The railroad knew that; indeed, it had contested that determination by the California Historic Resources Commission. The Park District was actively negotiating to acquire the line from mileposts 50 to 56.2, and the logical western terminus for excursion use of the line by the Park District was at the historic Standard station at approximately milepost 49.5, right in the middle of the segment in question. The railroad's declaration was thus misleading in the extreme. The notice of exemption under ICC's own regulation, and under ICC's representation of the intent of Congress, should be declared by the agency to be null and void, *ab initio*.

IV. ICC Cannot Avoid Compliance with NEPA and NHPA on Harmless Error Grounds.

ICC contended below that its failure to comply with NEPA and NHPA was irrelevant, because compliance would not have altered the course of the proceeding. In other words, ICC claimed that it would eventually have allowed the abandonment to become effective, the corridor would inevitably have been lost, and historic resources and environmental concerns unquestionably would have been adversely affected. The Ninth Circuit never reached ICC's "harmless error" argument, because it erroneously found itself without jurisdiction to reach any substantive issue. While the Park District and Friends view the due process, notice, NEPA and NHPA questions

tendered above as of grave national importance in their own right, we also note that ICC's claim of "harmless error" in this particular case is flatly wrong.

First and foremost, ICC's argument ignores a fundamental purpose of the procedures and deliberative processes required by NHPA and NEPA. In *Robertson v. Methow Valley Citizens Council*, 109 S.Ct. 1835, 1845 (1989), this Court stated that compliance with NEPA serves the important informational function, independent of the ultimate outcome of the process, of giving "the public the assurance that the agency 'has indeed considered environmental concerns in its decisionmaking process'. . . . Further, agency compliance "provides a springboard for public comment. . . ." *Id.*

In any event, Tuolumne Park and Recreation District and Friends of Sierra Railroad desire the line between mileposts 49 and 50 for continued rail use. Congress has provided a mechanism, codified at 49 U.S.C. § 10905, for parties interested in purchasing a line for continued rail use to obtain a stay of an abandonment authorization as well as a period to negotiate a purchase. If negotiations are not fruitful, either party may ask ICC to set the terms and conditions (including amount of compensation) for mandatory transfer for continued rail use. ICC sets that amount at the constitutional minimum value, which in general is the salvage value of track and ties, and the adjusted across-the-fence value of property owned by the railroad in the segment in question in fee. *See Chicago and North Western Transp. Co. v. United States*, 678 F.2d 665 (7th Cir. 1982) (upholding ICC valuation procedure under § 10905).

Had ICC afforded adequate notice, much less otherwise complied with NEPA and the NHPA, the Park District and Friends would have invoked 49 U.S.C. § 10905 to secure this line between mileposts 49 and 50. The Park District, which has independent taxing authority under California law, has the economic wherewithal to pay any

reasonable compensation set by ICC under the standards applicable under 49 U.S.C. § 10905. In short, if ICC had complied with the law, and if petitioners here had received a real opportunity for a hearing, they would have invoked § 10905 and obtained the line under it. This would have served not only the purposes of the Revised Interstate Commerce Act as manifest in § 10905, but also the purposes of the National Historic Preservation Act (because an historically significant line would have been retained), and the purposes of NEPA (because the loss of a line valuable to a public purpose would have been mitigated). The real tragedy of ICC's violation of the law in this case is that the errors the agency made were anything but harmless.

In the administrative proceedings below, ICC claimed that 49 U.S.C. § 10905 was not available for passenger/excursion type rail uses, but only for freight rail purposes. However, there is no such limitation on § 10905 either in the statute or in its legislative history. To the contrary, Judge Posner explained, after a careful review of the legislative history in *Chicago & North Western Transportation Company v. United States*, *supra*, 678 F.2d at 667, that § 10905 was adopted as part of a package to foster preservation of lines for passenger purposes. *See also Reed v. Mescrve*, 487 F.2d 646 (1st Cir. 1973) (ICC does not overstep its authority where it conditions abandonment to preserve historic rail line for excursion purposes and future use). Since we noted Judge Posner's decision to the agency, we do not understand ICC to be continuing to assert that § 10905 is unavailable.[48] If ICC does another result-driven regression to its earlier and erroneous claim that there is some mythical freight-only limitation in § 10905, then it will again be in direct conflict with the leading case interpreting the provision.

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[48] In any event, Tuolumne Park District will happily provide freight service to offset some of the costs of maintenance.

CONCLUSION

ICC's "footdragging and "papering over" of "defects" in its approach to environmental and public interest issues, and its failure to "deal[] with the substance of the deficiencies" was criticized by Justice Douglas some 14 years ago in *Aberdeen & Rockfish R. Co. v. SCRAP*, 422 U.S. 289, 328 (1975) (*SCRAP II*). Time and tolerance have not generated an improvement. Insulating violations of the law from judicial review through elaboration of legal fictions, as per the Ninth Circuit's ruling below, will only make the situation worse, in the ICC generally and by extension of the dis-enforcement of NEPA, NHPA, and notice rights, in ICC's sister agencies as well. Further, in this particular case, absent certiorari, an historic and publicly useful line apparently will be irretrievably lost. This petition for certiorari to the court of appeals for the Ninth Circuit should accordingly be granted.

Respectfully submitted,

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October 1989

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 87-7407

ICC No. AB-239X

FRIENDS OF SIERRA RAILROAD, INC. and TUOLUMNE PARK AND RECREATION DISTRICT,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION;
UNITED STATES OF AMERICA,
Respondents.

Appeal from a Decision of the
Interstate Commerce Commission

Argued and Submitted
April 11, 1989—San Francisco, California

Filed July 31, 1989

Before Herbert Y. C. Choy, J. Clifford Wallace and
Charles Wiggins, Circuit Judges.

Opinion by Judge Wallace

OPINION

WALLACE, Circuit Judge:

Friends of Sierra Railroad, Inc. (Friends) petitions for review of the refusal of the Interstate Commerce Commission (ICC) to reopen a class exemption granted to the Sierra Railroad (Sierra) which permitted Sierra to abandon a one-mile segment of its rail line. Friends argued that the ICC granted the exemption through an invalid procedure, and that even under that procedure Sierra's exemption was void. Friends sought through reopening first to require the ICC to conduct an environmental and historic preservation review of the abandonment, and second to secure an option to purchase the right-of-way of the abandoned segment. A petition was timely filed. Because we lack jurisdiction to entertain this petition, we dismiss.

I

Under the Staggers Act, a rail carrier may not abandon a rail line without first obtaining permission from the ICC. 49 U.S.C. § 10903 *et seq.* The Staggers Act contains a comprehensive and involved scheme of standards and procedures for abandoning rail lines. *See id.* As an exception to the otherwise burdensome procedures required by that Act to abandon a line, 49 U.S.C. § 10505 directs the ICC to exempt a transaction or class of transactions from regulation if it finds (1) its regulation is not necessary to carry out the rail transportation policy enunciated in 49 U.S.C. § 10101a and (2) either the transaction is of limited scope or regulation is unnecessary to protect shippers from abuse of market power. 49 U.S.C. § 10505. Pursuant to this statute, the ICC established exempt abandonment procedures for rail lines out of service for two years or longer. *See* 49 C.F.R. § 1152.50 (1984); *Exemption of Out of Service Rail Lines*, 366 I.C.C. 885 (1983).

On November 20, 1984, Sierra filed a notice of exemption pursuant to section 10505 and 49 C.F.R. § 1152.50 (1984) to abandon its one-mile rail line and underlying right-of-way between mileposts 49 and 50 in Tuolumne County, California. Sierra provided the California Department of Transportation with both advance notice of its intention to file a notice of exemption and an environmental notice pursuant to 49 C.F.R. § 1105.11 (1984). On January 2, 1985, the ICC published a notice of exemption in the Federal Register. 50 Fed. Reg. 188 (1985). This notice stated that the exemption would become effective February 1, 1985, unless stayed pending reconsideration. The notice advised that petitions to stay had to be filed by February 11, 1985, and that petitions for reconsideration had to be filed by February 21, 1985. At the same time, the ICC sent copies of the notice to the Governor of California and numerous California state agencies: the State Resources Agency (notices went to the Assistant Secretary, the State Historical Preservation Office, the Department of Parks & Recreation, and the Department of Parks & Recreation Planning Division); the California Coastal Commission; the Public Utilities Commission (notices went to the Commission and to the Chief of the Railroad Operations & Safety Branch); the Department of Fish & Game; the Office of Planning & Research; and the Rail Planning Branch of the Department of Transportation. On January 21, 1985, the California Public Utilities Commission mailed copies of the notice to several potentially interested persons. No objections were filed, and the exemption became effective as scheduled on February 1, 1985.

On January 28, 1986, over a year after the notice of exemption was published, Sierra began to salvage track and material on the line. As a result of the salvage operation, Friends became aware of the abandonment and promptly contacted the Advisory Council on Historic Preservation, which in turn informed the ICC's Section

Energy & Environment (ICC Environmental Section) that the California State Historical Resources Commission had previously determined that the line was eligible for inclusion in the National Register of Historic Places (National Register), and that the abandonment exemption had apparently been granted without review under section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470(b).

The ICC Environmental Section responded that it was unaware of the line's eligibility for the National Register and contacted Sierra "to encourage voluntary compliance with the historic preservation process." On May 6, 1986, Sierra offered to sell the line to the California Department of Parks & Recreation. When this department declined this offer, Sierra then offered and sold the line to Louisiana-Pacific Corporation. The deed of sale was recorded on June 18, 1986.

Also on June 18, 1986, Friends filed a petition asking the ICC to reopen the proceeding. The ICC denied Friends's motion to reopen on July 20, 1987. Friends's "Motion to Correct Decision," which the ICC treated as a petition for reconsideration, was denied on January 26, 1988.

Friends filed its petition for review in this court pursuant to 28 U.S.C. § 2344 on September 2, 1987, within the 60-day period after the ICC's July 20, 1987, denial of the petition to reopen. The petition in our court was held in abeyance pending resolution of Friends's petition to the ICC for reconsideration.

II

As a threshold matter, we must determine whether we have jurisdiction over this case. The Supreme Court recently spoke to this question in *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987) (*Locomotive Engineers*). Under 28 U.S.C. § 2344, a party seeking

to challenge a final order of the ICC must file a petition for review within 60 days after its entry. Clearly, Friend's petition is not timely for purposes of reviewing the original exemption authority, which was administratively final on February 1, 1985. *See id.* The time limit in 28 U.S.C. § 2344 is jurisdictional, and we have held that a subsequent unsuccessful petition to an agency to reopen cannot create a new final order giving our court jurisdiction over an untimely petition for review. *California Association of the Physically Handicapped, Inc. v. FCC*, 833 F.2d 1333, 1334 (9th Cir. 1987); *Provisioners Frozen Express, Inc. v. ICC*, 536 F.2d 1303, 1305 (9th Cir. 1976). Thus, we have no jurisdiction to review the original order.

Friends contends that, although we lack jurisdiction to review the original order, we nonetheless may review the ICC's denial of Friends's petition to reopen. The ICC's authority to reopen its prior actions arises from 49 U.S.C. § 10327(g). *Locomotive Engineers*, 482 U.S. at 277-78. 49 U.S.C. § 10327(g) provides in part:

> (g)(1) The Commission may, at any time on its own initiative because of material error, new evidence, or substantially changed circumstances—
>
> (A) reopen a proceeding;
>
> (B) grant rehearing, reargument, or reconsideration of an action of the Commission; and
>
> (C) change an action of the Commission.
>
> An interested party may petition to reopen and reconsider an action of the Commission under this paragraph under regulations of the Commission.

When the Commission refuses to reopen a proceeding, we review only the lawfulness of the refusal. *Locomotive Engineers*, 482 U.S. at 278. Our oversight is very limited. We may review the refusal to reopen only "[i]f

the petition that was denied sought reopening on the basis of new evidence or changed circumstances . . . otherwise, the agency's refusal to go back over ploughed ground is nonreviewable." *Id.* at 284. We cannot review such a refusal to reopen where the petition alleges only "material error." In such cases, an appeal from the denial of the petition "places before the courts precisely the same substance that could have been brought there by appeal from the original order." *Id.* at 279. The Court expressly prohibited such review even though it would serve the purpose of extending indefinitely the time for judicial review of "*seriously* mistaken agency orders." *Id.* at 280 (emphasis in original). Prohibiting review of denial of petitions to reopen alleging only material error is jurisdictional, not merely prudential, and is implicit in the Hobbs Act 60-day jurisdictional time limit on judicial review of ICC decisions. *See id.* at 281-82.

In evaluating reviewability of such petitions, we need not and may not examine the reasoning expressed in an ICC decision. Although here, as in *Locomotive Engineers*, the ICC decision refusing to reopen discussed the merits of the petition at length, we determine reviewability solely by examining the bases advanced in the petition to reopen. *See id.* at 280-81. The order denying Friends's petition is subject to review only if the petition sought reopening on the basis of "new evidence" or "substantially changed circumstances," regardless of the analysis contained in the ICC decision. We now determine whether Friends's petition to reopen qualifies to provide us jurisdiction.

A.

We first consider an argument in Friends's petition to reopen which involves the new evidence exception. It contends that the notice of exemption contained false or misleading information, and was thus void *ab initio* under 49 C.F.R. § 1152.50(d)(3) (1984). For purposes of obtaining our review, this argument is inherently self-

defeating. Friends asserts that Sierra's exemption notice failed to disclose that the line was eligible for the National Register under NHPA section 106 and that the State of California had an option to purchase the line. In other words, Friends is arguing that Sierra's exemption notice omitted *evidence available at the time.* Friends does not suggest that this is newly discovered evidence; the essence of its argument is that the evidence was already available. Although Friends's petition to reopen may have raised this evidence for the first time in these proceedings, *newly raised* evidence is not the same as *new* evidence. *See Union Mechling Corp. v. United States*, 566 F.2d 722, 726-27 (D.C. Cir. 1977); *Platnick Brothers, Inc. v. Norfolk & Western Railway Co.*, 367 I.C.C. 782, 785 (1983) (*Platnick Brothers*); *see generally United States v. Northern Pacific Railway Co.*, 288 U.S. 490, 493-94 (1933). While section 10327(g) does not define new evidence, "in an administratively final case it is only fair that 'new evidence' be in fact *new.* Thus, evidence that was reasonably available to the parties before the proceeding is not new evidence for purposes of the statute." *Platnick Brothers*, 367 I.C.C. at 785 (emphasis in original). Friends's petition in this argument raises "precisely the same substance that could have been brought by appeal from the original order," *Locomotive Engineers*, 482 U.S. at 279, and thus is not reviewable.

Friends argues, however, that the rule of *Locomotive Engineers* is premised on the assumption that the party bringing the petition to reopen has been involved in the proceeding since the beginning. Friends contends that while *Locomotive Engineers* may make sense as applied to such a party, its rationale would not apply to a party unable to participate until the time of its petition to reopen. Friends argues that the notice provisions in the ICC exempt abandonment procedure were inadequate, and thus deprived Friends of the opportunity to present its evidence on direct appeal of the original order, and in-

directly threatens to prevent us from reviewing this aspect of Friends's appeal of the denial of the petition to reopen. To support this argument, Friends points to the explanation in *Locomotive Engineers* that review of denial to reopen for new evidence or substantially changed circumstances is available because otherwise the petitioner might be "deprived of all opportunity for judicial consideration . . . of facts which, through no fault of his own, the original proceeding did not contain." *Id.* at 279.

This argument is unavailing because as a matter of law Friends had adequate notice of the original proceeding before the ICC. Complying with regulatory requirements, Sierra provided the required notice to the California Department of Transportation pursuant to 49 C.F.R. § 1105.11 (1984). The ICC published a timely notice of exemption in the Federal Register, *see* 50 Fed. Reg. 188 (1985), and sent copies of the notice to the Governor of California and numerous state agencies, including the State Historic Preservation office.

Friends complains that the Federal Register is unavailable in Jamestown, California, where Friends is located. Friends does not dispute that it is available within an hour's drive. But our decision that notice was adequate does not hinge on the driving distance between copies of the Federal Register and the headquarters of potentially interested parties to agency proceedings.

Publication in the Federal Register is legally sufficient notice to all interested or affected persons regardless of actual knowledge or hardship resulting from ignorance. *See* 44 U.S.C. § 1507; *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 384-85 (1947); *Government of Guam v. United States*, 744 F.2d 699, 701 (9th Cir. 1984); *Bennett v. Director, Office of Workers' Compensation Programs*, 717 F.2d 1167, 1169 (7th Cir. 1983); *North Alabama Express, Inc. v. United States*, 585 F.2d 783, 787 n.2 (5th Cir. 1978) (*North Alabama Express*).

The contents of the Federal Register notice plainly sufficed to inform any reader that Sierra wished to abandon the right-of-way. 50 Fed. Reg. 188 (1985). As the Fifth Circuit explained, "an interested member of the public should be able to read the published notice of [an] application and understand the essential attributes of that application. Others who see the notice should not have to guess the applicant's true intent." *North Alabama Express*, 585 F.2d at 789 (substance of trucking company's published notice in Federal Register held inadequate to alert interested parties to true nature of application). The notice as published should apprise a reasonable person of the issues involved in the proceeding. *Id.* at 786-87. The notice here met this standard.

This notice issue is distinct from the question whether, for purposes of 49 C.F.R. § 1152.50(d)(3), the notice contained false or misleading information and was thus void *ab initio*. Whether or not the exemption notice contained such information, it was plainly sufficient to provide notice to all interested persons of the abandonment proceeding. Therefore, we hold that this basis of Friends's petition to reopen, the argument that the notice of exemption contained false or misleading information and was thus void *ab initio* under 49 C.F.R. § 1152.50(d)(3), does not present a reviewable issue.

B.

Friends's petition next argued that the ICC's exempt abandonment procedure had subsequently been invalidated by the Court of Appeals for the District of Columbia in *Illinois Commerce Commission v. ICC*, 787 F.2d 616, 637 (D.C. Cir. 1986) (*Illinois Commerce I*), *remanding and vacating, Exemption of Out of Service Rail Lines*, 366 I.C.C. 885 (1983). This argument is based not on changed circumstances or new evidence, but rather, on material error, and therefore does not present a reviewable issue under *Locomotive Engineers*. *See Platnick*

Brothers, 367 I.C.C. at 787. In *Platnick Brothers*, the ICC considered a petition to reopen based in part on the argument that the ICC's market dominance guidelines had been invalidated by the Fifth Circuit. *Id.* at 783, 787. Although the petitioner characterized the circuit court's invalidation of ICC rules as a changed circumstance, the ICC explained that this ground for reopening was material error, not changed circumstances, because the argument was that its decision had been based on an invalid rule. *Id.* at 787. Here, similarly, Friends argues that the ICC's original grant of an abandonment exemption for Sierra was based on an invalid rule, the exempt abandonment procedure invalidated by the District of Columbia Circuit in *Illinois Commerce I*. Friends's ground for reopening is material error and thus unreviewable. *See id.*; *see also Western Pacific Stockholders' Protective Committee v. ICC*, 848 F.2d 1301, 1303 (D.C. Cir. 1988) (*Western Pacific*) (challenge to ICC valuation methodology alleged only material error and was therefore unreviewable); *Central States Enterprises v. ICC*, 780 F.2d 664, 672-73 (7th Cir. 1983) (*Central States*) (petition to reopen alleges material error where ICC misapplied and misinterpreted statutory provision). As previously explained, Friends had adequate notice of the original proceeding. Friends could have challenged the legal validity of the abandonment procedure at that time. *Cf. Pittston Coal Group v. Sebben*, 109 S. Ct. 414, 424-25 (1988) (where administrative procedure judicially invalidated, parties who sought direct judicial review of adverse agency decisions under invalid procedure could obtain readjudication of their cases; those who failed to seek direct judicial review were barred). The argument that this procedure is invalid "places before [us] precisely the same substance that could have been brought [here] by appeal from the original order." *Locomotive Engineers*, 482 U.S. at 279. We hold, therefore, that this ground of Friends's petition to reopen does not present a reviewable issue on appeal.

C.

The same principles which we applied in determining the reviewability of the denial of Friends's petition to reopen apply to the reviewability of the denial of Friends's petition for reconsideration. *See Locomotive Engineers*, 482 U.S. at 280-81, 285-86. If the petition is treated as a genuine "Motion to Correct Decision" as it was titled, that is, as seeking no more than correction of errors in the ICC's decision, "then the denial is unappealable because [Friends] was not 'aggrieved' by it within the meaning of the Hobbs Act [28 U.S.C. § 2344]." *Id.* at 285.

To the extent that this motion was a petition for reconsideration, as the ICC treated it, it alleged only material error, as the title "Motion to Correct Decision" suggests. Friends's first ground for reconsideration was to challenge the ICC's statement that the California State Historic Preservation Office had received notice of the ICC's January 2, 1985, Federal Register notice. This assertion fails to present new evidence or substantially changed circumstances. Friends's second ground was that Friends sought relief under 49 U.S.C. § 10905, and therefore the ICC erred in treating Friends's petition solely under 49 U.S.C. § 10906. This ground, like the first, rests on no more than material error. *See Western Pacific*, 848 F.2d at 1303 (petition to reopen rests on material error claim and is thus unreviewable, where basis is challenge to ICC's choice of stock valuation methodology); *Central States*, 780 F.2d at 672-73 (petition to reopen alleges material error where ICC misapplied and misinterpreted statutory provision); *see also John D. Copanos & Sons, Inc. v. FDA*, 854 F.2d 510, 527 (D.C. Cir. 1988) (petition unreviewable to extent that it elaborated on arguments already in record), *quoting Locomotive Engineers*, 482 U.S. at 279-80. Finally, Friends sought reconsideration on the ground that the ICC, erred in asserting that Friends and the State Historic Preser-

vation Office had actual notice and slept on their rights. This argument placed no new evidence before the ICC, but rather suggested material error in the ICC's interpretation of evidence it had already considered. Therefore, there is nothing for us to review in the ICC's denial of the petition for reconsideration.

Friends's petition for review presents no issue reviewable by this court. We therefore dismiss the petition for want of appellate jurisdiction.

DISMISSED.

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOTICE OF ENTRY OF JUDGMENT

Judgment was entered in this case as of the file date on the attached decision of the Court.

APPENDIX B

[Service Date Jan. 26, 1988]

INTERSTATE COMMERCE COMMISSION

DECISION

Docket No. AB-239X

S. R. INVESTORS, LTD., DOING BUSINESS AS SIERRA RAILROAD COMPANY—ABANDONMENT—IN TUOLUMNE COUNTY, CA

Decided: January 20, 1988

On August 13, 1987, Friends of the Sierra Railroad Company, Inc. (Friends or petitioner) filed a "Motion to Correct" the Commission's prior decision, served July 20, 1987, in this proceeding (the July 20th decision).[1] Petitioner seeks substantive changes to an administratively final action of the Commission; therefore, its pleading should have been filed as a petition to reopen and recon-

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[1] On September 2, 1987, Friends appealed the Commission's July 20th Decision to the United States Court of Appeals for the Ninth Circuit. *Friends of Sierra Railroad, Inc., and Tuolumne Park and Recreation District* v. *Interstate Commerce Commission and United States of America,* No. 87-7407 (Ninth Cir., filed September 2, 1987).

sider the July 20th decision.[2] As discussed below, we have decided to accept Friends' pleading and we will consider it as a petition to reopen. Louisiana-Pacific Corporation (LPC) replied to Friends' petition.

BACKGROUND

On November 20, 1984, S.R. Investors, Ltd., d/b/a/ Sierra Railroad Company (Sierra) filed a notice of exemption to abandon its 1-mile line of railroad between milepost 49.0 and milepost 50.0 in Tuolumne County, CA.[3] The California Department of Transportation (Caltrans) received both an advance notice of Sierra's intent to file the notice of exemption and an environmental notice. On January 2, 1985, the Commission published a notice of exemption in the *Federal Register* (50 *Fed. Reg.* 188), and invited interested persons to address environmental, energy, and public use concerns. Twelve California agencies received copies of the Commission's notice of exemption,[4] and the California Public Utilities Commission

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[2] Under 49 CFR 1115.3(a), a discretionary appeal is permitted when it is related to an action of the entire Commission in the first instance, and must be designated as a "petition to reopen."

[3] Sierra used the class exemption procedures at 49 CFR 1152, Subpart F, *Exempt Abandonments and Discontinuances of Trackage Rights* (49 CFR 1152.50). Those rules, which exempt carriers from formal requirements under 49 U.S.C. 10903 for abandonment or discontinuance of lines that have moved no local traffic for at least two years, were adopted in *Exemption of Out of Service Rail Lines*, 366 I.C.C. 885 (1983). (The proceeding was remanded for further consideration in *Illinois Commerce Commission* v. *ICC*, 787 F.2d 616 (D.C. Cir. 1986), and the rules were reinstated in *Exemption of Out of Service Rail Lines*, 2 I.C.C.2d 146 (1986).)

[4] Governor; State Resources Agency (three notices: Ass't. to the Secretary, Planning Div., and Dept. of Parks and Rec.); California Publ. Util. Comm. (two notices); California Coastal Comm.; Dept. of Fish & Game, Non-game Wildlife Coord.; State Historical Preservation Office (SHPO); Office of Planning Research; and Rail Planning Branch. *See* July 20th decision, at 8, fn. 19.

(PUC) mailed copies to potentially interested persons. There was no opposition to the exemption notice, and the exemption became effective on February 1, 1985.

On February 21, 1985, Pacific Gas and Electric Company filed a petition for reconsideration seeking a public use condition to secure an easement to transmit electricity along the right-of-way. However, Pacific Gas later withdrew its petition and on October 4, 1985, a decision dismissing its petition was served.

One year after the exemption notice was published, Sierra began to salvage track and material on the right-of-way. Friends then contacted the Advisory Council on Historic Preservation (ACHP) and the ACHP, in turn, notified the Commission's Section of Energy and Environment (SEE) that the California State Historical Resources Commission had previously determined that the involved line was eligible for inclusion in the National Register of Historic Places (NRHP). ACHP also informed SEE that the abandonment exemption apparently was granted without undertaking review under 16 U.S.C. 470(f) ("section 106 review") of the National Historic Preservation Act (NHPA). SEE notified ACHP that it was unaware of the line's eligibility status, but contacted Sierra "to encourage voluntary compliance with the historic preservation process."

On May 6, 1986, Sierra extended to the California Department of Parks and Recreation (CAP&R) the opportunity to purchase the abandoned right-of-way. After CAP&R declined to exercise its right to purchase, Sierra then offered to sell the property to LPC, the principal shipper of the line. A deed of sale to LPC was recorded on June 18, 1986.

The notice of exemption was in effect for over a year, when, on June 18, 1986, Friends filed a petition to reopen this proceeding. It asked the Commission to: (1) revoke the exemption; (2) reassert its jurisdiction; (3) find that

Sierra's use of the class exemption procedures at 49 CFR 1152.50 was improper in this case; and (4) conduct an abandonment proceeding in order to: (a) give Friends an opportunity to request a public use condition under 49 U.S.C. 10906, or an interim trail use condition under 16 U.S.C. 1247(d); and (b) comply with NHPA by affording a section 106 review.

By decision served July 20, 1987, the Commission denied reopening because it determined that it lacked jurisdiction to grant the relief requested.[5] The Commission concluded that it was impossible to return to the *status quo ante*, since the line has been abandoned and the right-of-way sold. We do not alter that finding here and, based on the evidence presented, once more deny reopening.

PRELIMINARY MATTERS

We will first address LPC's contention that we reject Friends' "Motion to Correct Decision" because the Commission's rules of practice do not provide for such relief. According to LPC, a petition to reopen is the more appropriate remedy available to Friends, since it seeks to correct "apparent mistakes" in the July 20th decision. LPC argues, however, that under 49 CFR 1115.4, a petition to reopen an administratively final action of the Commission may be filed only in certain circumstances. It argues that Friends has not met any of the criteria for reopening, as set forth under 49 CFR 1115.3(b)(1)-(3) and 49 CFR 1115.3(c), and requests that reopening be denied. It maintains that the requested corrections to the July 20th decision do not substantially affect the correctness of the Commission's decision and are merely an attempt to relitigate issues already decided.

We agree with LPC that our rules of practice do not permit interested parties to file "motions to correct de-

[5] Nevertheless, we reviewed on the merits all of Friends' contentions and found them unpersuasive.

cisions." The relief Friends' seeks can only be obtained by filing a petition to reopen under section 1115.4, pursuant to the requirements of section 1115.3(c) and (d).

Although Friends has not styled its pleading as a petition for reconsideration that is, in fact, what the motion is, and we will accept it as such. LPC's motion to strike petitioners' motion will be denied. We will consider Friends' motion under the criteria governing petitions for reconsideration. As discussed below, LPC will not be prejudiced in this regard.

LPC also moves that we strike the documents appended to petitioners' motion or, in the alternative, allow it an opportunity for rejoinder. These materials (a letter with 14 attachments [6]) seek to buttress petitioners' earlier argument that it did not receive notice of the exemption and that the Commission knew of the line's historical significance. The Commission's appellate procedures address specifically the introduction of new evidence at the appellate stage of a proceeding. 49 CFR 1115.3(c). Our regulations require that when a party seeks to introduce new evidence it must explain why that evidence was not previously adduced.

Friends did not respond to LPC's motion to strike and has not shown any materially changed circumstances that would justify admission of the evidence attached to its motion. The evidence it now seeks to introduce was clearly available at the time Friends submitted its initial statement. Petitioner has not explained why it did not submit this evidence with that statement.

The rationale underlying our rule governing the introduction of new evidence on appeal is one of fairness. A party should not be able to withhold available evidence until after it has obtained a result not to its liking, and then introduce that evidence on appeal, to the surprise of the other parties in the proceeding. Because Friends

[6] A brief description of the enclosures appears in Appendix A.

has offered no adequate explanation of why it did not earlier introduce the evidence appended to its motion, we will grant LPC's motion [7] and strike the challenged material.[8]

DISCUSSION AND CONCLUSIONS

Friends' initial petition to reopen was not filed until June 1986, even though Sierra's notice of exemption was published in January 1985 and became effective on February 1, 1985 because no objections to the exemption notice were filed within the time limits provided by 49 CFR 1152.50(d)(3). Indeed, by the time Friends filed its first pleading at the Commission, abandonment al-

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[7] We have reviewed the material in any event and find that it does not support Friends' contentions. Friends argues that the correspondence it has supplied shows that the Commission knew or should have known that the railroad was judged to be historically significant. Friends submits this evidence to dispute the Commission's contention that Friends slept on its rights by failing to notify the Commission in the exemption proceeding of its interest or its position. Friends also maintains that Commission staff had promised to advise it of any change in the status of the Sierra Railroad in a letter dated September 16, 1981.

The correspondence to which Friends refers was filed in connection with our earlier proceedings involving Sierra, Finance Docket No. 29505 and Finance Docket No. 29506. The Commission maintains its files by docket number and is dependent on that system for organizing the voluminous material submitted to it. The material was not filed in Docket No. AB-239X, and the Commission decided this case on the record made in this proceeding. To charge the Commission with knowledge in each case involving a particular carrier with matters outside that case because they were before the agency at one time would be an unrealistic and impossible burden. Moreover, the Commission's commitment in the September 16, 1981 letter was an assurance that Friends had been placed on the service list in Finance Docket No. 29506, and did not entitle Friends to rely on the Commission to provide it notice of "any change in status of the SRR line."

[8] Since we are striking these materials, LPC's motion for an opportunity to file a rejoinder is moot and will not further be considered.

ready had been consummated, the tangible property had been salvaged, and the right-of-way had been sold. We indicated in our prior decision, (at pp. 4-5, 10-11) that in these circumstances we lack authority to grant the relief Friends has requested, and found strong equitable reasons for not reopening this proceeding. Nothing Friends has offered following our July decision mandates a different result.

The discussion of this point in our prior decision requires some clarification here. As we said there, the Commission generally loses jurisdiction over an abandonment when it is consummated absent a showing of fraud or ministerial error.[9] We want to make clear, however, that if a timely administrative petition is outstanding (or a timely petition for judicial review is pending in court), consummation does not divest us (or the reviewing court) of jurisdiction to consider the pending issues and grant any relief that might be necessary. *See Busboom Grain Co.* v. *ICC*, 830 F.2d 74 (7th Cir. 1987); 49 U.S.C. 10327(g).

Moreover, section 10505 gives the agency the explicit power to revoke the authority the Commission confers under that provision. Section 10505(d) states that:

> (d) the Commission may revoke an exemption, to the extent it specifies, when it finds that application of a provision of this subtitle to the person, class or transaction is necessary to carry out the transportation policy of section 10101a of this title.

However, in deciding whether to exercise this authority we must balance concerns of administrative finality, repose and detrimental reliance with whatever factors favor reopening. Here insufficient grounds to justify reopening have been shown. In the notice of exemption issued in

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[9] No evidence exists in this proceeding that the exemption was obtained based on fraudulent or misleading representations by the petitioner or that the exemption was unlawfully granted.

this proceeding on January 2, 1986, the Commission invited petitions to stay the exemption contained in the notice (due 10 days after publication of the notice) and invited petitions to revoke that exemption to be filed within 20 days of the publication of the notice of exemption. Had a petition to revoke been timely filed, and had petitioners nevertheless consummated abandonment, the abandonment would have been subject to revocation despite consummation. Defendant would have had notice of the filing of the petitions to revoke and would have consummated at the risk that the exemption would be revoked.

In this case, Friends and the State agencies slept on their rights. In these circumstances the parties' expectations in acting on the Commission's order should be acknowledged and upheld. If rail carriers and shippers are unable to rely upon a Commission decision over a year after it has become final and effective (with no pending petitions for judicial review or stays of effectiveness), there would be no end to the administrative process and no certainty in administrative decisionmaking.

At issue in this proceeding is whether our prior decision contains material error warranting reopening.[10] As discussed *infra*, petitioner seeks a determination that our prior decision contains several mistakes which should be corrected. Its arguments are based primarily on whether it or the State Historic Preservation Officer (SHPO) received adequate notice, and whether its proposal to use the right-of-way for recreation and rail ex-

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[10] Under 49 CFR 1115.3(b), a petition to reopen will be granted only upon a showing of one or more of the following points: (1) the prior action (all categories) will be affected materially because of new evidence or changed circumstances; (2) the prior action was taken by a division in the first instance or by a division in an appellant capacity, and involves a matter of general transportation importance; or (3) the prior action was taken by the entire Commission in the first instance, and involves material error.

cursion purposes properly fell within the confines of section 10905 or section 10906. Although these issues were properly resolved in the prior decision, we will give further consideration to them here. Upon consideration of the evidence presented, we conclude that Friends has not demonstrated that the desired corrections are warranted.

1. *Friends' notice argument is without merit.* Petitioner requests that we delete from page one, second paragraph, lines 12-13 of our July decision the statement that "the State Historical Preservation Office (SHPO)" received a copy of the Commission's January 2, 1985, notice of exemption. It strongly believes that SHPO did not receive notice of the abandonment. LPC replies that notice of the exemption was published in the *Federal Register* and that California state agencies were served on several occasions.

As we noted in our prior decision, rail line abandonments are subject to the National Environmental Policy Act (NEPA) and NHPA. Sierra served on the California Department of Transportation a notice inviting interested parties to address environmental issues.[11] Although the railroad did not file an environmental report (49 CFR 1105.7),[12] the Commission served Sierra's environmental notice on a number of state environmental agencies, including SHPO. *See* July 20th decision at 1, fn. 4. The Commission also published the notice of ex-

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[11] Under rule 1105.11, a carrier is required to serve an environmental notice on a single designated state agency inviting interested persons to comment on environmental issues.

[12] We determined that Sierra's failure to file an environmental report under rule 1105.7 may have been "because the rule, on its face, applies to applicants—a technical term that need not be read to include exemptions." *See* July 20th decision, at 10, fn. 22. Our decision made clear that an environmental report will be required in abandonment exemption proceedings in the future. July 20th decision, at 10.

emption in the *Federal Register* on January 2, 1985.[13] It is difficult to conceive, therefore, how Friends could argue that SHPO never received notice of the abandonment exemption. Such statements are totally inconsistent with the evidence. Petitioner, therefore, has not shown just cause to support its requested correction on page one.

Nor would it be appropriate for us to delete our statement that "We also emphasize that both the California SHPO and Friends had actual notice of Sierra's exemption but that Friends, the SHPO, and other California agencies all slept on their rights" at page 10 paragraph five, last sentence, as petitioner requests. Friends argues that there is no evidence in the record to support the conclusion that Friends or SHPO had actual notice, or that they slept on their rights.

LPC responds that Friends cannot impose on Sierra the responsibility to give all potential litigants direct notice of its intent to abandon. It maintains that Sierra complied with all notice requirements and that any arguments to the contrary were properly considered in the prior decision.

As LPC states, Sierra was under no obligation specifically to inform Friends or other potential litigants of its intention to file an exemption application. That is the very reason our regulations require that we publish a notice of exemption in the *Federal Register*. Publication in the *Federal Register* ensures that all interested parties are informed of a railroad's intentions. In this case an accurate notice of exemption was published. Moreover, as described above, a considerable number of California agencies were served with actual copies of the Commission's January 2, 1985 notice of exemption. Thus, state agencies that received copies of the notice of exemption

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[13] A copy of the service list attached to the served decision indicates that SHPO was served. *See* Appendix B. The California SHPO has not appeared in this proceeding.

clearly had—but failed to use—an opportunity to participate in this proceeding in a timely manner.

In sum, SHPO received actual notice of the abandonment exemption. Friends did not. Petitioner was, however, afforded constructive notice by publication of the notice of exemption in the *Federal Register*.[14] The Commission's January 2, 1985, notice of exemption was, therefore, binding on all who had an interest in the abandonment, regardless of actual notice or of the hardship resulting from innocent ignorance. Friends' arguments to the contrary are without merit.

Although we determine that Friends received constructive and not actual notice of the abandonment exemption, the distinction is immaterial, especially when there was no statutory obligation to give Friends actual notice. Nor is this a substantive change to warrant reopening. Thus, our finding that Friends and SHPO received adequate notice of the abandonment exemption was correct.

2. *Friends' proposal properly fell within the provisions of section 10906.* Petitioner contends that, if this proceeding were reopened, it would definitely invoke section 10905 and not section 10906, since it seeks to use the right-of-way for rail purposes. It requests, therefore, that we delete the expression "Friends' proposal is not a section 10905 one but, instead, falls under section 10906." at page 5, second paragraph, lines 10-11.

LPC argues that, since this issue was never reached, it need not be corrected. It submits that any arguments regarding what Friends might have done had the proceeding been reopened is irrelevant to this proceeding. LPC further argues that the Commission correctly found that the relief petitioner sought was an impossibility. It

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[14] Publication in the Federal Register means constructive notice to all who may be affected. *See* K. Davis, *Administrative Law Treatise*, Vol. 1, Sec. 610, page 398 (1958); and *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 68 S.Ct. 1, 92 L.Ed. 10 (1947).

contends that the determination of whether Friends' proposal falls within section 10905 or section 10906 is within the Commission's discretion, and how an agency evaluates a party's position is determined by its expertise, jurisdiction and its interpretation of its statutes.

Friends sought reopening in order to use the right-of-way for recreation and rail excursion purposes. This proposal clearly falls outside of section 10905.

Section 10905 requires that the offeror demonstrate that the offer is one for continued freight service. Friends, on the other hand, seeks to use the right-of-way, not the line itself, for recreational trail use and rail excursion purposes. Such use clearly falls within section 10906 or the Trails Act, not section 10905. *See Rail Abandonments—Use of Rights-Of-Way As Trails*, 2 I.C.C.2d 591, 593-98 (1987).

Petitioner also appears to suggest that, because Sierra held the right-of-way pursuant to a railroad easement, the right-of-way would have been valued at zero for purposes of compulsory sale under section 10905.[15] This argument is irrelevant since this is not a section 10905 case and Friends long ago lost the opportunity to invoke the provisions of section 10905.[16] After the notice of ex-

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[15] We have generally assigned a zero value for land in calculating a carrier's opportunity costs when the carrier does not hold marketable title. *See* Docket No. AB-43 (Sub-No. 136), *Illinois Central Gulf Railroad Company—Abandonment—In Christian, Macon, and Shelby Counties, IL* (not printed), served August 4, 1986; and *Chicago and North Western Transp. Co.—Abandonment*, 363 I.C.C. 956, 959 (1981), *aff'd Chicago and North Western Transp. Co.* v. *U.S.*, 678 F.2d 655 (7th Cir. 1982).

[16] Although section 10905 applies to abandonment applications rather than abandonment exemptions, the Commission has adopted a policy the offer of financial assistance provisions of section 10905. *See* AB-269, *Iowa Terminal Railroad Co.—Abandonment—In Cerro Grando and Floyd Counties, IA* (not printed), served March 31, 1987.

emption was published in the *Federal Register*, Friends had 10 days to submit its offer of financial assistance on Sierra.[17] This it failed to do. Thus, it is irrelevant what value we would have assigned to the right-of-way. Moreover, Friends' argument regarding compulsory sale also lacks merit. As we previously stated, Congress has prohibited forced sales for public use. *See* July 20th decision, at 6.

We must conclude that Friends has failed to prove that the July 20th decision contains "apparent mistakes" warranting reopening. More importantly, Friends has failed to show material error in our prior decision. Nor has it shown that our prior decision would be affected materially because of new evidence or changed circumstances. Friends' allegations of error in our prior decision are unsupported by the evidence. Its evidence throughout this proceeding has been unpersuasive at best, even though we have allowed it further opportunity to present its case. Friends should not further delay this proceeding because all parties of interest had notice, either actual or constructive, of Sierra's intent to abandon the 1-mile line and Friends, the SHPO and other California agencies all slept on their rights. Thus, we will not reopen this proceeding and will deny Friends' petition.

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. LPC's motion to strike Friends' "Motion to Correct Decision" is denied.

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[17] The Commission has applied its proposed rules in Ex Parte No. 274 (Sub-No. 16), *Exemption of Rail Line Abandonments or Discontinuances—Offers of Financial Assistance*, on an interim basis to offers of financial assistance in exemption proceedings. Our final rules were served December 21, 1987.

2. LPC's motion to strike the material attached to Friends' "Motion to Correct Decision" is granted.

3. Friends' petition to reopen is denied.

4. This action is effective on the date of service.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Sterrett, Lamboley and Simmons.

NORETA R. MCGEE
Secretary

[SEAL]

APPENDIX A

Enclosure A—A letter, dated September 16, 1981, from the Commission's Section of Energy and Environment (SEE) to Bruce Cassasa indicates that Friends is placed on the service list in Finance Docket No. 29506.

Enclosure B—A letter, dated January 24, 1981, from Friends to the Commission refers to the historic status of the line.

Enclosure C—A letter, dated September 1, 1981, from Friends to the Commission indicates that Sierra's 56-mile line warranted historical status.

Enclosure D—A letter, dated November 5, 1981, from LPC to Cassasa in opposition to any listing of the Sierra in the NRHP.

Enclosure E—A letter, dated November 7, 1980, from Cassasa to LPC regarding LPC's opposition to the line's historic nomination.

Enclosure F—A letter, dated November 10, 1980, from Cassasa to the Commission requests review of the Silver Foot acquisition under the provisions of NHPA.

Enclosure G—A letter, dated November 26, 1980, from Silver Foot's attorneys to the Commission, in reply to the November 10, 1980 letter mentioned above. The counsel for Silver Foot objects to any protest of the sale agreement between Silver Foot and Sierra.

Enclosure H—A newspaper article indicates that the Commission approves the sale to Silver Foot of Sierra's freight operations. The article states that Friends seeks to block abandonment of the last 7 miles of track because of their historical significance. Although the Commission authorized abandonment of those last 7 miles of track, it specified that they remain in place until January 2, 1985. The article also states that the historic portion is being reviewed for possible purchase by the State.

Enclosure I—A newspaper article indicates that the State receives Friends' request for historic nomination of the entire 56-mile Sierra main-line, including a number of historic buildings, a water tower and several wooden trestles, in addition to tracks.

Enclosure J—A newspaper article, dated April 9, 1981, describes Cassasa as a former bandit responsible for the preservation of the Sierra Railroad from Oakdale to Tuolumne, CA.

Enclosure K—A newspaper article, dated July 13, 1982, indicates that Cassasa won his battle for the State to run "Railtown 1897" as an historic park.

Enclosure L—A newspaper article, dated May 3, 1981, describes Cassasa's desire to preserve the history of the Sierra Railroad.

Enclosure M—A newspaper article, dated May 29, 1984, indicates Friends' desire to buy and repair 6.2-miles of abandoned track in order to restore rail service to Tuolumne. The article refers to the purchase price of $200,000 as too excessive for Friends.

Enclosure N—A newspaper article, dated February 7, 1986, indicates that the removal of Sierra track is halted by the State due to opposition by Friends.

APPENDIX B

[Service Date Jan. 2, 1985]

INTERSTATE COMMERCE COMMISSION

Docket No. AB-239

S. R. INVESTORS, LTD., DOING BUSINESS AS SIERRA RAILROAD COMPANY—ABANDONMENT— IN TUOLUMNE COUNTY, CA

NOTICE OF EXEMPTION

Applicant has filed a notice of exemption under 49 C.F.R. 1152 Subpart F—*Exempt Abandonments* to abandon its 1-mile line of railroad between milepost 49.0 and milepost 50.0 in Tuolumne County, CA.

Applicant has certified (1) that no local traffic has moved over the line for at least 2 years and that overhead traffic is not moved over the line or may be rerouted, and (2) that no formal complaint filed by a user of rail service on the line (or by a State or local governmental entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Commission or has been decided in favor of the complainant within the 2-year period. The appropriate State agency has been notified in writing at least 10 days prior to the filing of this notice.

As a condition to use of this exemption, any employee affected by the abandonment shall be protected pursuant to *Oregon Short Line R. Co.-Abandonment-Goshen*, 360 I.C.C. 91 (1979).

The exemption will be effective February 1, 1985 (unless stayed pending reconsideration). Petitions to stay must be filed by February 11, 1985, and petitions for reconsideration, including environmental, energy, and public use concerns, must be filed by February 21, 1985, with:

Office of the Secretary
Case Control Branch
Interstate Commerce Commission
Washington, DC 20423

A copy of any petition filed with the Commission should be sent to applicant's representative:

Scott L. Glickson
36th Floor
444 North Michigan Avenue
Chicago, IL 60611

If the notice of exemption contains false or misleading information, use of the exemption is void *ab initio.*

A notice to the parties will be issued if use of the exemption is conditioned upon environmental or public use conditions.

Decided: December 26, 1984.

By the Commission, Heber P. Hardy, Director, Office of Proceedings.

/s/ James H. Bayne
JAMES H. BAYNE
Secretary

[SEAL]

APPENDIX C

[Service Date July 20, 1987]

INTERSTATE COMMERCE COMMISSION

DECISION

Docket No. AB-239X

S. R. INVESTORS, LTD., DOING BUSINESS AS SIERRA RAILROAD COMPANY—ABANDONMENT— IN TUOLUMNE COUNTY, CA

Decided: July 14, 1987

By petition filed June 18, 1986, and supplemented July 1, 1986, Friends of the Sierra Railroad, Inc. (Friends) requests that we: (1) reopen this proceeding; (2) find that use of the class exemption for abandonment of out-of-service rail lines [1] at 49 CFR 1152.50 was improper in this case; (3) reassert jurisdiction; and (4) conduct an abandonment proceeding in order to (a) give Friends the opportunity to request a public use condition under 49 U.S.C. 10906, or an interim trail use under 16 U.S.C. 1247(d), and (b) implement the National Historic Preservation Act (NHPA), by affording a review under 16

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[1] *Exemption of Out-of-Service Rail Lines*, 366 I.C.C. 885 1983), vacated and remanded in *Illinois Commerce Comm.* v. *ICC*, 787 F.2d 616 (D.C. Cir. 1986), readopted in *Exemption of Out-of-Service RailLines*, 2 I.C.C.2d 146 (1986).

U.S.C. 470(f) ("section 106 review"). The petition will be denied.

BACKGROUND

By Notice of Exemption (Notice) filed November 20, 1984, S. R. Investors, Ltd., d/b/a Sierra Railroad Company (Sierra) used the class exemption procedures at 49 CFR 1152, Subpart F, *Exempt Abandonments and Discontinuances of Trackage Rights* (49 CFR 1152.50), to abandon its 1-mile line of railroad between milepost 49.0 and milepost 50.0 in Tuolumne County, CA.[2] Sierra served both an advance notice of its intent to file a Notice of Exemption, and an environmental notice[3] on the California Department of Transportation (Caltrans). On January 2, 1985, the Commission served and published a notice of exemption in the *Federal Register* (50 *Fed. Reg.* 188). Twelve California agencies—including the State Historical Preservation Office (SHPO) and the Chief, Railroad Operations and Safety Branch, California Public Utilities Commission (PUC)—received copies of the Commission's January 2, 1985, exemption notice.[4] Moreover, on January 21, 1985, PUC mailed copies of the Commission's January 2nd notice to potentially interested persons. No objections to the exemption notice were filed, and the exemption became effective on February 1, 1985.

On February 21, 1985, Pacific Gas and Electric Company (PG&E) filed a petition for reconsideration[5] seek-

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[2] Sierra had previously abandoned the 6.2-mile end portion of its line between milepost 50.0 and milepost 56.2.

[3] Environmental notices, required by 49 CFR 1105.11, invite interested persons to comment on environmental matters.

[4] The Commission's notice of exemption described the line and the nature of the exempted action, and indicated the effective date of the exemption. It also invited interested persons to address, in petitions for reconsideration due February 21, 1985, environmental, energy, and public use concerns.

[5] Under rule 1152.50(d)(3), petitions for reconsiderations are due 20 days after a notice is served and published in the *Federal*

ing a public use condition under section 10906 to secure an easement to transmit electricity along the right-of-way. However, by letter dated September 3, 1985, PG&E voluntarily withdrew its petition, and on October 4, 1985, a decision dismissing its petition was served.

On January 28, 1986, over one year after the exemption notice was published, Sierra began to salvage track and material on the 1-mile right-of-way. As a result of the salvage operations, Friends became aware of the abandonment and contacted the Advisory Council on Historic Preservation (ACHP). ACHP, in a letter to the Commission's Section of Energy and Environment (SEE) dated January 30, 1986, stated that the California State Historical Resources Commission had previously determined that the involved line was eligible for inclusion in the National Register of Historic Places (NRHP), and that the abandonment exemption apparently was granted without section 106 review ACHP asked SEE to investigate the matter. In a letter to ACHP dated February 13, 1986, SEE stated that the Commission was unaware of the line's eligibility status, and that it had contacted Sierra "to encourage voluntary compliance with the historic preservation process."

On May 6, 1986, Sierra extended to the California Department of Parks and Recreation (CAP&R) the opportunity to purchase the abandoned right-of-way, at fair market value, in accordance with a previously existing agreement between Sierra and CAP&R.[6] In a letter dated

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Register, in order to permit the imposition of appropriate conditions prior to the date that the exemption becomes effective. In this case, petitions for reconsideration should have been due on January 22, 1985, instead of on February 21, 1985, as the notice stated. It appears that this error occurred because the due date was improperly calculated from the effective date of the class exemption, rather than the notice's publication date.

[6] The agreement, known as the "Amendment and Restatement of Easement and Trackage Rights," dated August 9, 1982, provides,

June 9, 1986, CAP&R declined to exercise its right to purchase. Sierra then offered the property to Louisiana-Pacific Corporation (LPC), the principal shipper on the line and the owner of the property on either side of all but about 200 feet of the 1-mile right-of-way. The sale to LPC was consummated and a deed of sale was recorded on June 18, 1986.

OVERVIEW

On June 18, 1986, Friends filed a "Petition to Implement Section 106 Review, NHPA (16 U.S.C. 407f)." On July 1, 1986, it filed a "Supplemental Petition to Reopen," asking the Commission to reopen and reconsider the exemption proceeding. Friends contends: (1) that Sierra's Notice is void because the rules at 49 CFR 1152.50 were vacated;[7] (2) that Sierra's Notice contained false or misleading information regarding the line's historic significance and suitability for public use, and, therefore, Sierra's use of the exemption is void *ab initio*; (3) that, despite *Federal Register* publication, adequate notice was not afforded to Friends or other historic preservation offices; and (4) that the Commission did not conduct a section 106 review as required under NHPA. Accordingly, Friends argues that we should reopen this proceeding, void the exemption, reassert jurisdiction, and order Sierra to refile for authority to abandon the line. Friends states that, in the context of such new proceedings, section 106 review must be conducted. Moreover,

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in section 17.2, that in the event Sierra elects to abandon railroad operations over all or any portion of its line, except that portion between milepost 35 and milepost 41, Sierra is to offer that portion of the property to the State at a cash price equivalent to the fair market value on the date of the offer.

[7] The exemption rules were in effect from 1983 until April 1986, when the D.C. Circuit vacated and remanded them in *Illinois Commerce Comm'n.* v. *ICC*, 787 F.2d 616 (D.C. Cir. 1986). The rules were reinstated in December 1986, when the Commission issued its decision on remand. *See* discussion *infra*.

Friends seeks the opportunity to request implementation of interim trail use under section 1247(d), or imposition of a public use condition under section 10906, requiring Sierra to transfer to Friends the involved right-of-way for recreation and rail excursion purposes. Friends argues that the Commission has the power to order a transfer of right-of-way for excursion railroad purposes, citing *Reed* v. *Meserve*, 487 F.2d 646 (1st Cir. 1973) (*Reed*).

Sierra and LPC oppose Friends' request. They assert that: (1) Sierra's use of the abandonment class exemption rules was proper because the rules were valid when Sierra invoked them in its exemption Notice and are valid now; (2) Sierra's notice contained no false or misleading information; (3) Sierra fully complied with all applicable rules; (4) NHPA is inapplicable; (5) Friends slept on its rights by waiting 16 months after the exemption was final to contest the abandonment; (6) reopening would be futile because the right-of-way has been sold to LPC, a good-faith purchaser for value, over whom the Commission has no jurisdiction; and (7) their expectations in acting on a final Commission exemption decision should be acknowledged and upheld. Under these circumstances, they argue, the Commission cannot require Sierra and LPC to return to the *status quo ante*.

After considering the issues presented in this case, we conclude that we lack authority to reconsider this exemption proceeding. The line has been abandoned and the right-of-way sold. Accordingly, we agree with Sierra and LPC that reopening would be futile. Because we have no remaining jurisdiction over the line, there is no way to return to the *status quo ante*. Thus, it is not possible to grant the ultimate relief Friends seeks.

PRELIMINARY MATTERS

On July 24, 1986, LPC filed a petition for leave to intervene under 49 CFR 1112.4(b). LPC states that its participation will not unduly disrupt this case or unduly

broaden the issues. LPC opposes reopening, supports Sierra's arguments, and requests that reopening be denied. LPC states that because it owns the right-of-way and makes substantial use of Sierra (LPC provides 85 percent of Sierra's outbound traffic), it has a vital interest in the proceeding.[8] We agree, but find it unnecessary to rule on the petition. The class exemption procedures do not require interested persons to petition to intervene. Rather, appropriate petitions for reconsideration (and replies) may be filed by any person who, like LPC, demonstrates a legitimate interest in the proceeding. LPC clearly has a genuine interest in the use of the right-of-way. Similarly, Sierra's and LPC's arguments concerning the allegedly improper intervention of Friends are rejected. Friends also has a legitimate interest in the right-of-way and its petition to reopen is properly before us.

On August 18, 1986, Friends filed a "Reply to Petition to Intervene." In a motion to strike filed September 8, 1986, however, LPC argues that Friends' reply is untimely under 49 CFR 1104.13(a) and does not address LPC's intervention petition, but instead Sierra's and LPC's July 24, 1986, "Reply in Opposition to the 'Supplemental Petition to Reopen' Filed by Sierra Railroad Company and Louisiana Pacific Corporation." Thus, LPC contends that Friends' pleading is a reply to a reply, which is not permitted under 49 CFR 1104.13(c).

On September 15, 1986, Friends responded to the LPC motion and requested that its August 18th "reply" be deemed a supplement to its prior petition to reopen since the Commission's rules of practice do not prohibit such supplemental pleadings.

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[8] LPC operates two lumber facilities in Tuolumne County: its Standard Mill, which abuts nearly all the involved right-of-way in this case; and a smaller mill at milepost 30.0 at Keystone, CA. In addition, LPC is constructing a steam-generated electricity plant on the line adjacent to milepost 49.0.

LPC's motion to strike will be denied. Although we look with disfavor on attempts to thwart rule 1104.13(c), given the nature of this controversy we have decided to accept Friends' "reply" to ensure that we have before us all of its evidence and arguments. Given our ultimate conclusion, we find that LPC will not be prejudiced in this regard.

On July 24, 1986, LPC and Sierra filed a petition under 49 CFR 1104.13(a), 1117.1, and 1152.25(c)(4) requesting waiver of the 30-page limitation for replies in abandonment proceedings. It will be granted.

On July 14, 1986, Friends filed a "Reply to Sierra Railroad" addressing certain matters raised in Sierra's June 30, 1986, letter to Chairman Gradison in response to Friends' initial petition. We will waive rule 1104.13(c) with respect to Friends' July 14th pleading.

DISCUSSION AND CONCLUSIONS

1. *We lack jurisdiction to grant the relief requested.* Plainly, the Commission, under 49 U.S.C. 10327, can reassert jurisdiction, reopen a proceeding, and revoke an exemption where an abandonment (whether authorized in an abandonment certificate or permitted by means of an exemption) is not yet consummated.[9] Once abandonment is consummated, however, the abandoned line is no longer a part of, or functions in, interstate commerce and, thus, is no longer subject to Commission jurisdiction. *Hayfield Northern R. Co.* v. *Chicago & N.W. Transp. Co.*, 467 U.S. 622, 623 (1984) (*Hayfield*). We have found that the only exception to this rule is when there was fraud, misrepresentation, or ministerial error in authorizing abandon-

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[9] Section 10327(g)(1) provides that the Commission may, at any time, reopen a proceeding to address material error, new evidence, or substantially changed circumstances. *See* also 49 U.S.C. 10505(d) which permits the Commission to revoke an exemption when it finds

ment.[10] As discussed below, there is no fraud, misrepresentation, or ministerial error here. Our regulations at 49 CFR 1152.50(d)(3) provide that, under the class exemption invoked by Sierra, "If the notice of exemption contains false or misleading information, the use of the exemption is void *ab initio* and the Commission shall summarily reject the exemption notice." A purported abandonment undertaken without the Commission's authority —or based on a void notice—would simply be an unauthorized cessation of service and removal of track, and would constitute a violation of section 10903. As will be discussed below, the class exemption was properly available here and the notice submitted by Sierra was accurate and complete.

In this case, it is clear that the abandonment was consummated. Indeed, the tangible property has been salvaged and the right-of-way sold.[11] Under these circum-

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that application of the Interstate Commerce Act is necessary to carry out the rail transportation policy under 49 U.S.C. 10101a.

[10] Docket No. AB-11, *Chicago & East. Ill. R. Co.-Abandonment Between-Joppa Junction and Fayville Junction, IL* (not printed), served July 28, 1981; and Docket No. AB-1 (Sub-No. 183X), *Chicago & N.W. Transp. Co.-Abandonment Exemption in Hardin County, LA* (not printed), served July 18, 1985.

[11] Abandonment is consummated when a certificate of public convenience and necessity (or, by analogy, an exemption notice) is issued and has become effective, tariffs have been cancelled, and operations have ceased. (The Commission no longer requires carriers to file a letter stating that abandonment has been consummated.) *See Black* v. *I.C.C.*, 762 F.2d 106, 112 (D. C. Cir. 1985) (Black), and *Common Carrier Status of States, State Agencies*, 363 I.C.C. 132, 135 n. 2 (1980). In this case, Sierra ceased operations at least 2 years before filing its Notice, and its exemption became effective on February 1, 1985. No tariff cancellation has occurred, however.

Nevertheless, it is possible, under certain circumstances, to find that abandonment has been consummated despite the lack of a tariff cancellation. When genuine questions arise about whether the consummation criteria have been met, an inquiry about the actual

stances, we cannot reopen this proceeding and reassert jurisdiction that we have already lost. Moreover, because the right-of-way subsequently was sold, it would be impossible to return to the *status quo ante.*

Even if there were no such obstacles, we could not grant the relief Friends ultimately seeks—an order requiring Sierra to transfer the right-of-way to Friends for public use or trail use. Contrary to Friends' argument, we do not have the power to require railroads to sell property for public use other than for continued rail service under 49 U.S.C. 10905. *Chicago and North Western Transp. Co.—Abandonment,* 363 I.C.C. 975, 976 (1981). *See* also *Chicago and N. W. Transp. Co.* v. *United States,* 582 F2d 1043, 1049 (7th Cir.) *cert. denied* 439 U.S. 1039 (1978). Friends' proposal is not a section 10905 one but, instead, falls under section 10906.[12]

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intent of the railroad is appropriate. *See Black, supra,* at 112-113. The issue, thus, becomes whether Sierra *intended* to cease permanently all transportation service on the 1-mile segment. See *Simmons* v. *I.C.C.,* 808 F.2d 22 (7th Cir. 1987). Sierra: (1) stopped its transportation service years ago; (2) filed for abandonment exemption authority; (3) commenced salvage of the track and materials in January of 1986; (4) entered into arrangement to sell the line [including extending to California the opportunity to purchase the right-of-way under an agreement where abandonment was a condition precedent (*see* n. 6, *supra*)]; and (5) did sell the right-of-way to a non-transportation company whose property abuts both sides of substantially all of the right-of-way.

These facts demonstrate conclusively that, even without tariff cancellation, Sierra did intend to cease permanently its operations over the line, and that this was its intent from the time it filed its Notice. Accordingly, we conclude that Sierra fully abandoned the line no later than January 28, 1986, the date Sierra began salvage operations on the line.

[12] Those situations in which a purchaser has no affirmative plans for uninterrupted service or a continuation of service within a reasonable time, but merely holds out the possibility of service at some unspecified future time, are not properly considered offers of financial assistance to avoid abandonment or discontinuance and do not fall within the scope of section 10905. *Abandonment of R. Lines*

Recretational trail use also falls outside section 10905, and is within the scope of either section 10906 or the Trails Act, neither of which is a condemnation statute. *Rail Abandonments—Use of Rights-of-Way As Trails*, 2 I.C.C.2d 591, 593-98 (1987). Moreover, *Reed, supra*, the 1973 case Friends relies on, is inapplicable because it predates enactment of sections 10905 and 10906. Under present law, fashioned to deal specifically with post-abandonment public use, Congress has limited any general power we formerly exercised by prohibiting forced sales for public use.

In short, section 10906 and the Trails Act are voluntary. We provide time for the parties to negotiate agreements. We do not, however, require parties to actually negotiate and we do not set terms.

Nor would it be appropriate for us to grant Friends' belated request for section 106 review. In *Morris City Trust for Historic Preservation* v. *Pierce*, 714 F.2d 271, 280 (3rd Cir. 1980) (*Morris City*), the court held that the NHPA is applicable to ongoing Federal actions "at any stage of an undertaking where alterations might be made to modify its impact on historic preservation." By contrast, the NHPA is inapplicable where, as here, a proceeding is administratively final and jurisdiction over the action is otherwise absent. For these reasons we are unable to grant the relief Friends seeks.

2. *The class exemption was available here.* Friends argues that Sierra's abandonment pursuant to the exemption procedures contained in 49 CFR 1152.50 is void because the Commission's decision adopting the class exemption [13] was vacated and remanded in *Illinois Comm.*

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and Discontinuance of Serv., 365 I.C.C. 249, 260 (1981). Instead, such proposals, like Friends', fall under section 10906.

[13] *Exemption of Out of Service Rail Lines*, 366 I.C.C. 885 (1983) (*Exemption I*).

Com'n v. *I.C.C.*, 787 F.2d 616 (D.C. Cir. 1986) (*Illinois*). On the other hand, Sierra relies on the fact that the exemption was in effect at the time it used it. We agree with Sierra.

An agency must apply the law in effect at the time it renders a decision, unless doing so would result in manifest injustice, or is contrary to a statutory directive or legislative history. *See Bradley* v. *Richmond School Board*, 416 U.S. 696, 711 (1974). The class exemption under section 10505, and the implementing rules, 49 CFR 1152.50, were in full effect both when Sierra filed its Notice, and when Sierra consummated abandonment. There is no evidence that application of the rules would result in manifest injustice. On the contrary, the legislative history of section 10505 not only encourages, but mandates use of exemptions where appropriate findings are made. *Illinois* did not hold that we could not adopt the exemption, but simply found that our rationale for doing so was inadequately explained (a deficiency that has since been cured).[14] The court's order was not retroactive in its effect. Thus, any abandonment consummated in reliance upon, and pursuant to the terms of, the exemption when it was effective is fully lawful, not void as petitioners argue.

3. *Sierra's Notice was not false or misleading.* Friends argues that, even if Sierra's use of the class exemption rules was proper, its exemption, nevertheless, is void under rule 1152.50(d)(3), which provides, in part, that if a Notice contains false or misleading information, use of the exemption is void *ab initio*. In sup-

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[14] Indeed, in *Exemption of Out of Service Rail Lines*, 2 I.C.C.2d 146 (1986) (*Exemption II*), we reaffirmed and readopted Exemption I and the implementing rules. This later decision more fully discusses the issues that *Illinois* found were inadequately addressed in *Exemption I*. An appeal of *Exemption II* is pending in *Illinois Commerce Commission, et al.* v. *Interstate Commerce Commission, et al.*, No. 86-1687 (D.C. Cir., filed Dec. 15, 1986).

port, Friends states that Sierra was aware of the historic, cultural, and recreational importance of the line, and aware of the substantial state and local interest in the preservation and potential for recreational use of the line,[15] but that Sierra failed to disclose such information, and incorrectly asserted in its Notice that the right-of-way was not suitable for sale for public use under section 10906. Friends argues that these omissions and statements rendered the Notice false and misleading. Friends similarly states that Sierra did not reveal the existence of an alleged restriction on the title to the right-of-way.[16]

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[15] Friends states that Sierra has been aware, for example, that: (1) the Tuolumne City Recreation District of Tuolumne City, CA, is actively seeking to acquire Sierra's abandoned right-of-way between milepost 50.0 and 56.2 for recreational and light rail transit uses; (2) "Railtown 1897" State Historic Park, a 26-acre former steam maintenance facility, is located at milepost 41.0 at Jamestown, CA, and is part of the California State Park System; (3) the State of California has an option to purchase substantial portions of Sierra's right-of-way upon abandonment by Sierra, including the right-of-way portion at issue here; (4) the right-of-way is scenic and has been used as a site for movie filming; (5) the right-of-way is eligible for listing in the National Register of Historic Places; and (6) abandonment would bifurcate the line, precluding a link-up of the first 49 miles of the right-of-way with the 6.2 miles being purchased by Tuolumne City, and impeding access to the 6.2-mile right-of-way from an existing road.

[16] Rule 1152.50(d)(2) requires, among other things, that notices of exemption contain the information called for under 49 CFR 1152.22(a)(1)-(4) and (8), and (e)(5). Section 1152.22(e)(5) states:

> Statement of whether the properties proposed to be abandoned are suitable for use for other public purposes, including roads or highways, other forms of mass transportation, conservation, energy production or transmission, or recreation. If the applicant is aware of any restriction on the title to the property, including any reversionary interest, which would affect the transfer of title or the use of property for other than rail purposes, this shall be disclosed.

Sierra and LPC maintain that the Notice was accurate and complete. They claim that it was appropriate to characterize the right-of-way as unsuited for public use because of its poor condition and location. They explain that, because the line has not been used for freight service for 23 years, or for passenger service since 1979, the ties have deteriorated, the track has become overgrown with vegetation, and the materials in the line have rusted. Uncut logs from LPC milling operations are stacked along the right-of-way. In addition, they state that a study of Sierra's entire 56.2-mile right-of-way, prepared for the Tuolumne County and Cities Area Planning Council of Sonora, CA (the Woodside Study), dated May 26, 1986 (Exhibit F. Sierra reply filed June 30, 1986), concluded that the configuration of the right-of-way through LPC's logging yard would make passenger operations difficult and potentially hazardous. The Woodside Study also concluded that a Friends proposal to construct an alternative route through LPC's facility was impractical because rehabilitation was expensive, passenger operations were economically unfeasible, and LPC opposed the idea.

We conclude that Sierra's Notice was not false or misleading. The abandonment exemption rules do not require disclosure of the information that Friends argues should have been included in Sierra's Notice. *See* 49 CFR 1152.50(d)(2). Moreover, we find that it was reasonable for public use due to the deteriorated condition of the line and proximity to LPC's facilities. The Woodside Study also supports Sierra's position that the line segment at issue here is not suited to the type of public use that Friends proposes.

Nor can Sierra's failure to respond to the title restriction question in rule 1152.22(c)(5)[17] be characterized as a material error. Friends has offered no specific evi-

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[17] 49 CFR 1152.22(c)(5) requires disclosure of any restriction which could affect the transfer of title, or the use of property, for other than rail purposes.

dence about the nature of any restriction. Although PG&E apparently determined that it was not necessary for it to obtain an easement from Sierra for transmission of electricity because Sierra did not have a fee simple title (*see* our October 4, 1985, decision in this proceeding), we know that Sierra offered the property to CAP&R for nonrail purposes and subsequently sold the property to LPC for nonrail purposes. Thus, without more evidence, we conclude that Sierra's title to the right-of-way was not restricted in a manner contemplated by rule 1152.22(e)(5). In these circumstances, we reject Friends' title restriction claims.

4. *Notice was adequate here.* Friends admits that a notice of this exemption was published in the *Federal Register* but alleges that notice was inadequate because it was unaware of the abandonment exemption, since the *Federal Register* is unavailable in Jamestown, CA, where it is located. Therefore, it argues that we should consider, at this late date, its request for a public use or trail use condition, and for section 106 review.

Sierra states that copies of the *Federal Register* are maintained in Modesto and Stockton, CA, both within one hour's drive of Jamestown, and that, therefore, Friends had all of the notice to which it was entitled under the class exemption rules. Sierra also points out that PG&E filed a timely petition for reconsideration, but that Friends, on the other hand, waited until 16 months after the exemption became effective and 13 months after the time for seeking judicial review under the Hobbs Act to object to the abandonment.

There is no merit to Friends' notice claims.[18] *Federal Register* notice is deemed proper public notice. In addi-

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[18] If Friends is challenging the adequacy of the Commission's regulations, its argument is an improper collateral attack on the abandonment class exemption rulemaking.

As for Friends' section 10906 and Trails Act requests, we emphasize that the *Federal Register* notice provided in this case is

tion, a considerable number of other California State offices and agencies were served with actual copies of the Commission's January 2, 1985, notice of exemption.[19] However, despite this notice, neither Friends nor any of these agencies filed a timely comment or petition to implement either section 10906 or section 1247(d). Thus, it is clear that the problem here is not adequacy of notice, but the fact that Friends and the state agencies slept on their rights. In these circumstances the parties' expectations in acting on the Commission's exemption order should be acknowledge and upheld. If rail carriers and shippers are unable to rely upon a Commission decision over a year after it became final and effective (with no pending petitions for judicial review or stays of effectiveness), there would be no end to the administrative process and no certainty in administrative decision making. Friends and state agencies that received copies of the notice of exemption clearly had—but failed to use—their opportunity to participate in this proceeding. We will not reopen to permit untimely requests to be made at this time.

5. *Section 106 review is not appropriate at this time.* Notwithstanding the fact that this line has been fully abandoned—and that LPC bought the right-of-way in June 1986[20]—Friends asserts that the Commission now

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precisely the notice required by our rules and procedures. Furthermore, regarding Friends' ability to purchase the property, it is significant that CAP&R actually had the opportunity to purchase the abandoned right-of-way but declined to do so.

[19] Governor; State Resources Agency (three notices: Ass't. to the Secretary, Planning Div., and Dept. of Parks and Rec.); California Publ. Util. Comm. (two notices); California Coastal Comm.; Dept. of Fish & Game, Non-game Wildlife Coord.; SHPO; Office; Office of Planning Research; and Rail Planning Branch.

[20] There is no merit to Friends' argument that neither Sierra nor LPC would be prejudiced by reopening because they consummated the sale of the right-of-way with knowledge of Friends' interest in it.

should implement section 106 review because on August 7, 1981, the California State Historical Resources Commission determined that the entire Sierra right-of-way was eligible for listing in the NRHP. Friends maintains that, under section 106, all Federal agencies must, prior to issuing any license, investigate the applicability of NHPA and give the ACHP an opportunity to comment where an agency's action may have an effect on property found eligible for inclusion in the NRHP.

Sierra and LPC maintain that Sierra complied with all of the environmental rules and that Friends' NHPA arguments are flawed and untimely. They argue that because the line's NRHP eligibility determination occurred only at the state level and was never forwarded to the Keeper of the NRHP, it lack official status and cannot be a means to trigger reopening and section 106 review, citing *Committee, Etc.* v. *Birmingham Branch, Etc.*, 497 F. Supp. 504 (N.D. Ala. 1980) and *Birmingham Realty Co.* v. *General Services*, 497 F. Supp. 1377 (N.D. Ala. 1980).

Contrary to Sierra's arguments, eligibility under the NHPA is not restricted to property that has been finally determined eligible for inclusion in the NRHP. Rather, property is eligible for NHPA review on the basis of whether it *meets* NRHP criteria.[21] Thus, the involved right-of-way qualified for NHPA review.

Section 106 of the NHPA provides that an agency having jurisdiction over a Federally licensed undertaking shall, prior to issuing the license, take into account the effect of the undertaking on any site, structure, or building that is included in or eligible for inclusion in the NRHP, and that the agency head shall afford the ACHP the opportunity to comment on the undertaking. Like the

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[21] *See Boyd* v. *Roland* 789 F.2d 347, 349 (5th Cir. 1986), where the court disagreed with the arguments and rationale of the district court decisions cited by Sierra and LPC in support of their arguments.

National Environmental Protection Act of 1969, 42 U.S.C. 4332 (NEPA), the NHPA is primarily procedural. *Morris Cty., supra*, 714 F.2d at 278-79. The NHPA requires the Commission to "take into account" historic preservation goals, but does not preclude the agency from taking any particular action or require that the goals of historic preservation be elevated over other appropriate considerations.

Rail line abandonments are subject to NEPA and NHPA. *Harlem Valley Transportation Ass'n.* v. *Stafford*, 500 F.2d 328 (2nd Cir. 1974). The Commission cannot exempt carriers from the requirements of NEPA, or other environmental statutes. Exemption I, *supra*, 366 I.C.C. at 890.

The Commission's rules implementing NEPA and NHPA, at 49 CFR Part 1105, require applicants (*i.e.*, proponents of an action) to provide environmental information to the Commission. Two environmental rules—rule 1105.7 involving reporting, and rule 1105.11 involving notice—are pertinent here. Under rule 1105.7(a), persons initiating abandonment proceedings are required to file environmental reports in application proceedings. Such reports provide information about eligibility of property for NHPA review, alternatives to a proposed action, and the possible effects of the action on various areas of environmental concern. Specifically, rule 1105.7(c)(10)(i) asks whether sites or structures listed in the NRHP will be affected, and, if so, asks that the effects be described. Rule 1105.7(c)(10)(ii) states that, if sites or structure 50 years old or older and not listed on the NRHP will be affected, the applicant must, at the earliest possible juncture, submit a description, map, and photographs of the site or structure to the appropriate SHPO for review. Under rule 1105.7(c)(10)(iii), if culturally significant locations will be affected, the applicant should consult with the appropriate SHPO.

Rule 1105.11 requires applicants to serve one all-purpose environmental notice of an action on a single designated state agency, inviting interested persons to address environmental issues. An environmental notice contains no affirmative statements about the impact of the action, however.

Sierra filed an environmental notice under rule 1105.11 (which is cross-referenced under the exemption rules at 49 CFR 1152.50), but did not file an environmental report.[22] Thus, the California SHPO was not given the precise information and notice provided under rule 1105.7(c)(10), and the Commission received no specific environmental information under rule 1105.7.

The environmental reporting requirements at 49 CFR 1105.7 should be applied to abandonment exemption proceedings under 49 U.S.C. 10505 (as well as to abandonment applications filed under section 10903). An environmental report is intended to ensure agency knowledge and consideration of the possible environmental consequences of pending proceedings. An environmental report also ensures adequate notice to environmental agencies.

Although we want to make it clear that environmental reports will be required in abandonment exemption proceedings in the future, we cannot and will not reopen this proceeding for the filing of an environmental report. Nor do we believe it would serve a useful purpose to attempt, at this late date, to mitigate harm to historic structures through section 106 review.

There are also strong equitable reasons for not reopening this proceeding. These include the substantial amount of time that has passed from the time Sierra's abandon-

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[22] The environmental report regulations (49 CFR 1105.7) are not cross-referenced under the exemption rules. Sierra may not have filed an environmental report because the rule, on its face, applies to "applicants"—a technical term that need not be read to include exemptions.

ment was exempted (February 1985) to the time that Friends' petition to reopen was filed (June 1986), and in addition, the good faith reliance by Sierra and LPC on the exemption authority in abandoning and purchasing, respectively, the right-of-way. We also emphasize that both the California SHPO and Friends had actual notice of Sierra's exemption, but that Friends, the SHPO, and other California agencies all slept on their rights.

Objections to agency proceeding should be made while the agency has the opportunity for correction. *United States* v. *Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952). As the Supreme Court there concluded (*Id.*):

> [s]imple fairness to those who are engaged in the tasks of administration and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate its practice.

There is no valid excuse for the untimeliness of Friends' petition for reconsideration—or for the extremely late requests for section 106 review. We lack authority to reconsider our exemption decision and the NHPA no longer applies once a proceeding has become administratively final, *Morris Cty., supra*, 714 F.2d at 280. Thus, NHPA does not require, at this late date, that we reopen and reconsider how to mitigate harm to historic structures.

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. The motion to strike the "Reply to Petition to Intervene" filed by Friends of the Sierra Railroad on August 18, 1986, is denied.

2. The petition to waive the 30-page limitation for replies in abandonment proceedings is granted.

3. On our own motion, 49 CFR 1104.3 is waived with respect to Friends' pleading dated July 14, 1986.

4. The petition to reopen is denied for lack of jurisdiction.

5. This action is effective on August 19, 1987.

By the Commission, Chairman Gradison, Vice Chairman Lamboley, Commissioners Sterrett, Andre, and Simmons.

NORETA R. MCGEE
Secretary

[SEAL]

APPENDIX D

STAFF EVALUATION

In 1981, the State Historical Resources Commission considered the nomination for the Sierra Railroad Historic District, including Railtown and the 500 miles of line associated with the Railroad. At that time the Commission approved the nomination, recommending listing at the state level of significance. The nomination remained at OHP, however, due to changes in federal regulations regarding property owner notification, a lack of proper photos in the file, staffing changes at OHP, and changes in the railroad's ownership. In 1986, the issue of the railroad's eligibility surfaced again, when the owners of the railroad were involved in an environmental review related to a permit to abandon service on part of the line. (A federal permit was required). Since the nomination had never been submitted to the Keeper of the Register, the owners of the Railroad wished to have it reheard by the Commission, with a view toward establishing that the property was not eligible for listing. At its meeting on February 6, the Commission will be asked to consider that argument. It is staff's opinion, however, that the railroad was eligible in 1981 and is still eligible today. A recent study by John Snyder of the California Department of Transportation has provided the basis for the current nomination. No significant changes to the property have taken place that would warrant a negative determination, and the evaluation provided to the Commission in 1981 is still valid. That evaluation, by Steven Mikesell, currently historian with the California Department of Transportation, is enclosed. The Commission may wish to note that other railroads, including grades, tracks and rolling stock have been listed in the National Register and that this nomination is not therefore unique or even unusual. The Cumbres and Toltec Railroad in New Mexico (approximately 20-30 miles), and the Den-

ver & Rio Grande Western from Durango to Silverton Colorado (a distance of about 60-90 miles), have both been listed. The fact that these lines have had periodic maintenance and replacement of tracks, even recently, has not been considered sufficient to have impaired their integrity. The Sierra Railroad has also been subject to such maintenance and replacement of tracks, yet again, in staff's opinion, integrity has not been significantly impaired. It is recommended that the Railroad be listed at the state level of significance.

MARYLN BOURNE LORTIE

January 26, 1987

STAFF EVALUATION—SIERRA RAILROAD HISTORIC DISTRICT

The Sierra Railroad is, in the view of staff, eligible for listing on the National Register at the state level of significance. Historically, this railroad was vital to the economic life of a large region of the state, with tracks extending through the counties of Stanislaus, Tuolumne, and Calaverns. The Sierra was the transportation lifeline for such momentous developments as construction of the Hetch Hetchy Dam, the reopening of the major quartz mines in Calaveras and Tuolumne Counties, and the opening of major timber stands in Tuolumne County. The statewide significance of this property, however, is best understood in terms of Criterion C rather than Criterion A. In the view of staff, the Sierra Railroad is the most intact historic railroad system in California. Other historic properties in the state retain integrity of track alignment, rollingstock or railroad yard structures. The Sierra is unique in that all of these major components have been preserved.

Clearly, the focus of this application is the Railtown complex in Jamestown. The eighteen structures here date largely from the period, 1897-1910, and constitute a workable turn-of-the-century railroad yard. Although deteriorated, the components of the system work—the repair shop is equipped to repair steam equipment, the turntable turns, the water tower is watertight, and so forth. The rollingstock is similarly functional and until recently was used on a popular tourist railroad attraction. The California legislature in June, 1981, appropriated $1.5 million to purchase and restore the Railtown complex. It is anticipated that Railtown will be added as a State Park unit some time in 1981.

The trackage beyond Railtown retains a lower degree of integrity. Except for the depot at Standard, no historic structures exist along this line. The alignment of tracks

is generally historically accurate. Because the line runs through uninhabited areas, the integrity of setting is exceptional, accounting for the popularity of the Sierra Railroad as a set for Western movies.

The Sierra Railroad qualifies for listing on the National Register of Historic Places at the state level of significance under Criteria A and C.

ADVISORY
COUNCIL ON
HISTORIC
PRESERVATION

The Old Post Office Building
1100 Pennsylvania Avenue, NW, #809
Washington, DC 20004

[Jan. 30 1986]

Mr. Carl P. Bausch
Chief, Section of Energy and Environment
Office of Transportation Analysis
Interstate Commerce Commission
Washington DC 20423

Dear Mr. Bausch:

We have just been notified by Mr. Bruce Cassassa of the Friends of the Sierra Railroad that the Sierra Railroad is removing track between mileposts 49 and 50 on its line near Sonora, California. This rail line has been determined eligible for the National Register of Historic Places.

Mr. Cassassa advises us that the work is being done under an ICC exemption, docket number AB 239X. Apparently this exemption was granted on November 1, 1985 without compliance with Section 106 of the National Historic Preservation Act.

Would you please investigate this matter and advise us of your findings? If the exemption was granted without compliance with Section 106, we hope that ICC can find a way to prevail upon the Sierra Railroad to halt work on the track removal until ICC has complied with our regulations (36 CFR Part 800).

I appreciate your prompt attention to this request. To discuss the matter further, please contact Mr. Robert Fink of our western Division of Project Review at 776-2682 (FTS) or 303/236-2682 (Commercial).

Sincerely,

/s/ Thomas F. King
THOMAS F. KING
Director, Office of
Cultural Resource Preservation

INTERSTATE COMMERCE COMMISSION
WASHINGTON, D.C. 20423

OFFICE OF TRANSPORTATION ANALYSIS

February 13, 1986

Mr. Thomas F. King
Director, Office of Cultural
Resource Preservation
The Old Post Office Building
1100 Pennsylvania Avenue, N.W.
Room 809
Washington, D.C. 20004

Dear Mr. King:

Thank you for your letter of January 30, 1986, concerning Docket No. AB-239X, a proceeding seeking to exempt from economic regulation the abandonment of one mile of Sierra Railroad track in or near Sonora, California. The exemption petition was granted by the ICC, which was unaware that the railroad had been determined to be eligible for listing in the *National Register of Historic Places.*

We recently contacted the railroad in an effort to encourage voluntary compliance with the historic preservation process. We were informed that the railroad has ceased salvage operations along the one-mile segment of track that was the subject of its exemption petition. The extent of loss has yet to be determined.

If, upon further investigation, it appears that whatever remains of the track is worthy of preservation, we will proceed in accordance with our draft programmatic memorandum of agreement (copy enclosed). That agreement, which has been pending for more than six months, strikes the most effective balance between the conflicting statutory objectives of the Interstate Commerce Act and

the National Historic Preservation Act. Accordingly, we have chosen to operate under the terms of the agreement despite the fact that it has not been ratified.

We will keep you informed with respect to any further developments in this matter.

Sincerely,

/s/ Carl Bausch
CARL BAUSCH
Chief
Section of Energy and
Environment

Enclosure

INTERSTATE COMMERCE COMMISSION

MEMORANDUM

Date: July 31, 1986

To: Donald Shaw, Acting Deputy Director
Office of Proceedings

From: Wm. R. Southard, Director
Office of Transportation Analysis

Subject: AB-239X SIERRA RAILROAD ABANDONMENT EXEMPTION PETITION

This responds briefly to your request for our views in the matter of the Friends of the Sierra Railroad's petition to reopen the subject abandonment exemption proceeding for the limited purpose of complying with section 106 of the National Historic Preservation Act. A review of the ICC's approach to compliance with the National Historic Preservation Act would be helpful.

The ICC is aware of its nondelegable responsibilities under the National Historic Preservation Act and implemental rules promulgated by the Advisory Council on Historic Preservation. In order to fulfill those responsibilities, the ICC requires railroad abandonment applicants in nonexempt proceedings to supply historic preservation officers in each affected State with relevant information. For reasons not entirely clear, the ICC did not incorporate this requirement into its procedures governing exempt transactions. Instead, an all purpose notice is provided in exempt proceedings only to a single agency in each affected State. The designated agency for most States is the executive department.

Given the very accelerated processing schedule involved in exempt proceedings, state historic preservation offices seldom become aware of railroad abandonment exemption proposals. This was the case with the Sierra Railroad's abandonment exemption petition.

The notice procedures adopted by the ICC to fulfill its National Historic Preservation Act responsibilities in the context of nonexempt abandonment proceedings is workable and fair. The same may not be said of the notice procedures applicable to abandonment exemption proceedings.

It is axiomatic in the law that notice must be of such nature as reasonably to convey the required information. *See Mullane* v. *Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314 (1950). This principle applies equally to the administrative process. The notice procedures adopted by the ICC for abandonment exemption proceedings are not of such nature, especially as those procedures apply to the environmental process, including National Historic Preservation Act compliance. Whether this omission constitutes a defect of such substantial proportion that agency decisionmaking in exempt proceedings may be invalidated is a question for the Office of General Counsel. We believe, however, that until notice procedures applicable to exempt proceedings are revised to better accommodate our responsibilities under environmental review laws, we will encounter many more challenges to our decisionmaking process, adding substantially to our workload.

APPENDIX E

Constitutional Provisions, Statutes and Regulations Involved

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, libery, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 102 of NEPA

42 U.S.C. § 4332

Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

> (A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council

on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.[1]

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involved unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

Section 106 of NHPA

16 U.S.C. § 470f

Effect of Federal undertakings upon property listed in National Register; comment by Advisory Council on Historic Preservation

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is

included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under sections 470i to 470v of this title a reasonable opportunity to comment with regard to such undertaking.

Offers of financial assistance to avoid abandonment and discontinuance

(a) In this section—

(1) "avoidable cost" means all expenses that would be incurred by a rail carrier in providing transportation that would not be incurred if the railroad line over which the transportation was provided were abandoned or if the transportation were discontinued. Expenses include cash inflows foregone and cash outflows incurred by the rail carrier as a result of not abandoning or discontinuing the transportation. Cash inflows foregone and cash outflows incurred include—

(A) working capital and required capital expenditure;

(B) expenditures to eliminate deferred maintenance;

(C) the current cost of freight cars, locomotives, and other equipment; and

(D) the foregone tax benefits from not retiring properties from rail services and other effects of applicable Federal and State income taxes.

(2) "reasonable return" means—

(A) if a rail carrier is not in reorganization, the cost of capital to the rail carrier, as determined by the Interstate Commerce Commission; and

(B) if a rail carrier is in reorganization, the mean cost of capital of rail carriers not in reorganization, as determined by the Commission.

(b) Any rail carrier which has filed an application for a certificate of abandonment or discontinuance shall provide promptly to a party considering an offer of financial assistance and shall provide concurrently to the Commission—

(1) an estimate of the annual subsidy and minimum purchase price required to keep the line or a portion of the line in operation;

(2) its most recent reports on the physical condition of that part of the railroad line involved in the proposed abandonment or discontinuance;

(3) traffic, revenue, and other data necessary to determine the amount of annual financial assistance which would be required to continue rail transportation over that part of the railroad line; and

(4) any other information that the Commission may deem necessary to allow a potential offeror to calculate an adequate subsidy or purchase offer.

(c) When the Commission finds under section 10903 of this title that the public convenience and necessity require or permit abandonment or discontinuance of a particular railroad line, it shall, concurrently with service of the decision upon the parties, publish the finding in the Federal Register. Within 10 days following the publication, any person may offer to pay the carrier a subsidy or offer to purchase the line. Such offer shall be filed concurrently with the Commission. If the offer to subsidize or purchase the line is less than the carrier's estimate provided under subsection (b)(1) of this section, the offer shall explain the basis of the disparity, and the manner in which the offer of subsidy or purchase is calculated.

(d) If, within 15 days after the publication required in subsection (c) of this section, the Commission finds that—

(1) a financially responsible person (including a government authority) has offered financial assistance to enable the rail transportation to be continued over that part of the railroad line to be abandoned or over which all rail transportation is to be discontinued; and

(2) it is likely that the assistance would be equal to—

(A) the difference between the revenues attributable to that part of the railroad line and the avoidable cost of providing rail freight transportation on the line, plus a reasonable return on the value of the line; or

(B) the acquisition cost of that part of the railroad line;

the Commission shall postpone the issuance of a certificate authorizing abandonment or discontinuance in accordance with subsections (e) and (f) of this section.

(e) If the carrier and a person offering financial assistance enter into an agreement which will provide continued rail service, the Commission shall postpone the issuance of the certificate for so long as the agreement, or an extension or modification of the agreement, is in effect. If the carrier and a person offering to purchase a line enter into an agreement which will provide continued rail service, the Commission shall approve the transaction and dismiss the application for abandonment or discontinuance. If the carrier and a financially responsible person (including a government authority) fail to agree on the amount or terms of the subsidy or purchase, either party may, within 30 days after the offer is made, request that the Commission establish the conditions and amount

of compensation. If no agreement is reached within 30 days after the offer is made and neither party requests that the Commission establish the conditions and amount of compensation during that same period, the Commission shall immediately issue a certificate authorizing the abandonment or discontinuance.

(f) (1) Whenever the Commission is requested to establish the conditions and amount of compensation under this section—

(A) the Commission shall render its decision within 60 days;

(B) where subsidy has been offered, the Commission shall determine the amount and terms of subsidy based on the avoidable cost of providing continued rail transportation, plus a reasonable return on the value of the line; and

(C) where an offer of purchase has been made in order to continue rail service on the line, the Commission shall determine the price and other terms of sale. In no case shall the Commission set a price which is below the fair market value of the line (including, unless otherwise mutually agreed, all facilities on the line or portion necessary to provide effective transportation services).

(2) The decision of the Commission shall be binding on both parties, except that the person who has offered to subsidize or purchase the line may withdraw his offer within 10 days of the Commission's decision. In such a case, the Commission shall immediately issue a certificate authorizing the abandonment or discontinuance, unless other offers are being considered pursuant to paragraph (3) of this subsection.

(3) If a carrier receives more than one offer to purchase or subsidize, it shall select the offeror with whom it wishes to transact business, and complete the sale or

subsidy agreement, or request that the Commission establish the conditions and amount of compensation prior to the 40th day after the date on which notice was published under subsection (c) of this section. If no agreement on subsidy or sale is reached within the 40-day period and the Commission has not been requested to establish the conditions and amount of compensation, any other offeror may request that the Commission establish the conditions and amount of compensation. If the Commission has established the conditions and amount of compensation and the original offer has been withdrawn, any other offeror may accept the Commission's decision within 20 days of such decision, and the Commission shall require the carrier to enter into a sale or subsidy agreement with such offeror, if such sale or agreement incorporates the Commission's decision.

(4) No purchaser of a line or portion of line sold under this section may transfer or discontinue service on such line prior to the end of the second year after consummation of the sale, nor may such purchaser transfer such line, except to the carrier from whom it was purchased, prior to the end of the fifth year after consummation of the sale.

(5) Any subsidy provided under this section may be discontinued on notice of 60 days. Unless, within such 60-day period, another financially responsible party enters into a subsidy agreement at least as beneficial to the carrier as that which was or was to be discontinued, the Commission shall, at the carrier's request, immediately issue a certificate authorizing the abandonment or discontinuance of service on the line.

49 U.S.C. § 10906

Offering abandoned rail properties for sale for public purposes

When the Interstate Commerce Commission finds under section 10903 of this title that the present or future public

convenience and necessity require or permit abandonment or discontinuance, the Commission shall find further whether the rail properties that are involved in the proposed abandonment or discontinuance are suitable for use for public purposes, including highways, other forms of mass transportation, conservation, energy production or transmission, or recreation. If the Commission finds that the rail properties proposed to be abandoned are suitable for public purposes, the properties may be sold, leased, exchanged, or otherwise disposed of only under conditions provided in the order of the Commission. The conditions may include a prohibition on any such disposal for a period of not more than 180 days after the effective date of the order, unless the properties have first been offered, on reasonable terms, for sale for public purposes.

49 C.F.R. § 1152.50 as adopted at 366 ICC 893 (1983)

EXEMPTION OF OUT OF SERVICE RAIL LINES

APPENDIX B

Revisions to the Code of Federal Regulations

PART 1152

49 CFR 1152 is amended as follows:

Part 1152 is amended by adding a new subpart F to read as follows:

Subpart F—Exempt abandonments

1152.50 Exempt Abandonments

(a) A proposed abandonment of a railroad line is exempt from the provisions of 49 U.S.C. 10903-10905 if the criteria designated in this section are satisfied.

(b) An abandonment is exempt if the carrier certifies that no local traffic has moved over the line for at least 2 years and any overhead traffic on the line can be rerouted over other lines, and that no formal complaint filed by a user of rail service on the line regarding cessation of service over the line either is pending with the Commission or has been decided in favor of the complainant within the 2-year period. The complaint must allege (if pending) or prove (if decided) that the carrier has imposed an illegal embargo or other unlawful impediment to service.

(c) The Commission has found that its prior review and approval of these abandonments (1) is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101a; and (2) is of limited scope and unnecessary to protect shippers from abuse of market power. 49 U.S.C. 10505. A notice must be filed to use this class exemption. The procedures are set out in section 1152.50(d). This

class exemption does not relieve a carrier of its statutory obligation to protect the interests of employees, 49 U.S.C. 10505(g)(2) and 10903(b)(2). This also does not preclude a carrier from seeking an exemption of a specific abandonment.

(d) Notice of exemption.

(1) At least 10 days prior to filing a notice of exemption with the Commission, the railroad seeking the exemption must notify in writing the Public Service Commission (or equivalent agency) in the State(s) where the line will be abandoned. The notice shall name the railroad, describe the line to be abandoned, indicate the exemption procedure being used, and include the approximate date that the notice of exemption will be filed with the Commission.

(2) The railroad must file a verified notice using its appropriate abandonment docket number and subnumber with the Commission at least 50 days before the abandonment is to be consummated which includes the proposed consummation date, the certification required in section 1152.50(b), the information required in section 1152.32 (a)(1-4), (8) and (e)(5), the level of labor protection, and a certificate that the notice requirements of section 1152.50(d)(1) have been complied with.

(3) The Commission through the Director of the Office of Proceedings, shall publish a notice in the *Federal Register* within 20 days after the filing of the exemption. Petitions to say the effective day of the exemption must be filed within 10 days after publications and petitions for reconsideration must be filed within 20 days after publication. The exemption will be effective 30 days after publication (unless stayed pending reconsideration). If the notice of exemption contains false or misleading information, the use of the exemption is void *ab initio* and the Commission shall summarily reject the exemption notice.

(4) To address environmental issues and whether the right-of-way is suitable for other public purposes under 49 U.S.C. 10906, a party shall submit evidence to the Commission within 20 days of publication in the Federal Register. A notice to the parties will be issued if use of the exemption is conditioned upon environmental or public use conditions.

40 C.F.R. § 1506.6 (1987)

Public involvement.

Agencies shall:

(a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures.

(b) Provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected.

(1) In all cases the agency shall mail notice to those who have requested it on an individual action.

(2) In the case of an action with effects of national concern notice shall include publication in the FEDERAL REGISTER and notice by mail to national organizations reasonably expected to be interested in the matter and may include listing the *102 Monitor*. An agency engaged in rulemaking may provide notice by mail to national organizations who have requested that notice regularly be provided. Agencies shall maintain a list of such organizations.

(3) In the case of an action with effects primarily of local concern the notice may include:

(i) Notice to State and areawide clearinghouses pursuant to OMB Circular A-95 (Revised).

(i) Notice to Indian tribes when effects may occur on reservations.

(iii) Following the affected State's public notice procedures for comparable actions.

(iv) Publication in local newspapers (in papers of general circulation rather than legal papers).

(v) Notice through other local media.

(vi) Notice to potentially interested community organizations including small business associations.

(vii) Publication in newsletters that may be expected to reach potentially interested persons.

(viii) Direct mailing to owners and occupants of nearby or affected property.

(ix) Posting of notice on and off site in the area where the action is to be located.

(c) Hold or sponsor public hearings or public meetings whenever appropriate or in accordance with statutory requirements applicable to the agency. Criteria shall include whether there is:

(1) Substantial environmental controversy concerning the proposed action or substantial interest in holding the hearing.

(2) A request for a hearing by another agency with jurisdiction over the action supported by reasons why a hearing will be helpful. If a draft environmental impact statement is to be considered at a public hearing, the agency should make the statement available to the public at least 15 days in advance (unless the purpose of the hearing is to provide information for the draft environmental impact statement).

(d) Solicit appropriate information from the public.

(e) Explain in its procedures where interested persons can get information or status reports on environmental impact statements and other elements of the NEPA process.

(f) Make environmental impact statements, the comment received, and any underlying documents available to the public pursuant to the provisions of the Freedom of Information Act (5 U.S.C. 552), without regard to the exclusion for interagency memoranda where such memoranda transmit comments of Federal agencies on the environmental impact of the proposed action. Materials to be made available to the public shall be provided to the public without charge to the extent practicable, or at a fee which is not more than the actual costs of reproducing copies required to be sent to other Federal agencies, including the Council.

Supreme Court, U.S.
FILED
JAN 16 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-701 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1989

TUOLUMNE PARK AND RECREATION DISTRICT, ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals had jurisdiction to review a decision of the Interstate Commerce Commission (ICC or Commission) that became final in February 1985, when the petition for review was not filed within the 60-day time limit set forth in 28 U.S.C. 2344 for review of ICC decisions.

2. Whether the court below properly applied *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987), in concluding that it lacked jurisdiction to review the ICC's later decisions, in July 1987, not to reopen its February 1985 proceeding.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-701

TUOLUMNE PARK AND RECREATION DISTRICT, ET AL., PETITIONERS

v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 881 F.2d 663. The decisions of the Interstate Commerce Commission (Pet. App. 13a-50a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 1989. The petition for a writ of certiorari was filed on October 30, 1989 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The ICC has exclusive and plenary authority over rail line abandonments. *Chicago & N.W. Transp. Co.* v. *Kalo*

Brick & Tile Co., 450 U.S. 311, 319 (1981). Ordinarily, to be relieved of its common carrier obligation to provide service on a line, a rail carrier must apply to the ICC for a certificate of abandonment under 49 U.S.C. 10903. The ICC then must determine whether "the present or future public convenience and necessity require or permit the abandonment." 49 U.S.C. 10903(a). In making that determination, the Commission balances the needs of shippers and communities for the line against the burden that the line imposes on the carrier and interstate commerce. See *Colorado v. United States*, 271 U.S. 153, 168 (1926). The Commission's governing statutes contain instructions for the filing and processing of abandonment applications. See, *e.g.*, 49 U.S.C. 10904(e)(3).

Since 1980, the ICC has had the authority to exempt a service from regulation when it finds that: (1) regulation is not necessary to carry out Congress's rail-transportation policy set out in 49 U.S.C. 10101a, and (2) either the transaction is of limited scope, or regulation is not needed to protect shippers from the abuse of market power. See 49 U.S.C. 10505(a).[1] The Commission has used this exemption power to allow certain carriers to abandon their lines without following the regular abandonment procedures

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[1] Section 10505 was enacted because Congress believed that, although it had been able to "indentify broad areas of Commerce where reduced regulation is clearly warranted, the Commission is more capable through the administrative process of examining specific regulatory provisions and practices not yet addressed by Congress to determine where they can be deregulated consistent with the policies of Congress." H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 105 (1980). Congress expected that "as many as possible of the Commission's restrictions on changes in prices and services by rail carriers will be removed through the use of Section 10505, and that the Commission will adopt a policy of reviewing carrier actions after the fact to correct abuses of market power." *Ibid.*

under 49 U.S.C. 10903. See *Exemption of Out-of-Service Rail Lines*, 2 I.C.C.2d 146 (1986) (*Out-of-Service*), aff'd *sub nom. Illinois Commerce Commission* v. *ICC*, 848 F.2d 1246 (D.C. Cir.), cert. denied, 109 S. Ct. 783 (1988).

In authorizing a rail abandonment, the ICC must consider the environmental consequences of its action under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321-4343 (1982 & Supp. V 1987). Under the National Historic Preservation Act (NHPA), 16 U.S.C. 470f, the Commission also must "take into account" the effect of its decision on historic properties.[2] As the Commission recognized in the instant case, NEPA and NHPA apply to an abandonment action whether it is taken under Section 10903 (full abandonment proceedings) or under Section 10505 (exemption proceedings). See *Illinois Commerce Commission* v. *ICC*, 848 F.2d at 1257-1260;[3] *Connecticut Trust for Historic Preservation* v. *ICC*, 841 F.2d 479, 483-484 (2d Cir. 1988).

2. The abandonment in this case was authorized under the ICC's *Out-of-Service* class exemption, which allows the abandonment of lines that have not generated any traffic for at least two years and are not a necessary link to other

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[2] The ICC's rules implementing NEPA and NHPA are codified at 49 C.F.R. Pt. 1105. Rule 1105.7(a) requires persons initiating abandonment proceedings to furnish a detailed environmental report discussing such issues as alternatives to the proposed action and effects on land use, wetlands, air, energy, wildlife, historic sites and structures, and the coastal zone. Under Rule 1105.11, they must serve a special environmental notice on a designated state agency that invites interested persons to address environmental issues. Under Rule 1105.6, the Commission prepares an environmental assessment in each abandonment case.

[3] In *Illinois Commerce Commission* v. *ICC*, the court upheld the Commission's out of service abandonment regulations as facially consistent with the requirements of NEPA and NHPA. See 848 F.2d at 1258-1261.

lines. 49 C.F.R. 1152.50. The procedures for abandoning such lines are designed to eliminate unnecessary regulatory requirements, while alerting the Commission to any special circumstances that would warrant disallowing or conditioning the abandonment. The carrier must provide at least 60 days' advance notice of the abandonment to affected states. The ICC also publishes a notice in the *Federal Register* at least 30 days in advance; that notice tells interested parties that they can request that the exemption authority for that line be revoked or conditioned. See 49 C.F.R. 1152.50(d); 49 U.S.C. 10505(d).[4]

In November 1984, the Sierra Railroad (Sierra) invoked the *Out-of-Service* class exemption for a one-mile segment of its rail line in Tuolumne County, California. [5] Sierra had notified the California Department of Transportation, in October 1984, of this request. Pet. App. 3a, 32a. The ICC issued a notice of the proposed abandonment (*id.* at 29a-30a), which it served on twelve California agencies, including the Governor's Office, the State Resources Agency, and the State Historic Preservation Office. *Id.* at 3a, 14a-15a & n.4; 22a-23a, 32a. The ICC also published the notice in the *Federal Register*, 50 Fed. Reg. 188 (1985). The notice advised that: (1) the exemption (*i.e.*, the line abandonment) was scheduled to become effective on February 1, 1985, (2) petitions for reconsideration or stay could be

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[4] Under 49 U.S.C. 10505(d), the Commission may revoke an exemption, to the extent it chooses, when it finds that application of the regulatory provision involved to that person, class, or transaction "is necessary to carry out the transportation policy of section 10101a."

[5] From the late 1800s until 1980, Sierra had operated a 56.2 mile line. It received authority to abandon a 6.2 mile segment at the end of the line (between milepost 50.0 and 56.2) in 1981. The instant proceeding pertains to the segment between milepost 49 and 50. No freight had moved over this one-mile segment in the past 20 years, and passenger service had ceased in 1979.

filed, and (3) interested parties could raise not only transportation issues, but environmental, energy, and public-use concerns as well. Pet. App. 30a.

No party raised any environmental concerns and the exemption took effect in February 1985 without any further action by the ICC.[6] Sierra later contracted to sell the property to a third party, Louisiana Pacific Corporation (now Fibreboard Corporation).[7] The deed of sale was recorded on June 18, 1986. See Pet. App. 4a; 15a; 34a.

3. On June 18, 1986—the date the right-of way was sold—petitioners first formally petitioned the ICC for relief. See Pet. App. 15a-16a; 34a.[8] Petitioners argued, *inter alia*, that Sierra's abandonment authority was defective because the ICC had failed to conduct a NEPA and NHPA analysis for Sierra's line. Petitioners contended that the ICC must therefore reprocess the exemption.

In July 1987, the ICC issued a decision (*Sierra I*) denying the request to reopen. Pet. App. 31a-50a. The ICC acknowledged (*id.* at 45a-48a) that it should have considered the environmental consequences before allowing the abandonment exemption to be used for this line. It corrected its procedures for the future to assure a full and timely environmental analysis in abandonment cases brought under the exemption regulations. Because this abandonment had already been consummated and the right-of-way sold, however, the ICC concluded that it could not reopen this

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[6] The only petition received—a utility's request for a public-use condition to secure an easement to transmit electricity—was voluntarily withdrawn.

[7] Fibreboard, a non-carrier, operates a milling operation abutting the line. It already owned the property on either side of all but about 200 feet of the one-mile right-of-way.

[8] Petitioner Friends of Sierra Railroad, Inc. first sought relief from the ICC; petitioner Tuolumne Park and Recreation District later joined the proceeding asking the ICC to reconsider its February 1985 action.

case. *Id.* at 37a-49a (citing *Hayfield Northern R.R.* v. *Chicago & N.W. Transp. Co.*, 467 U.S. 622, 623 (1984)). The Commission noted (Pet. App. 44a-45a, 49a) that petitioners (as well as the State agencies that had received notice) had slept on their rights by waiting 16 months after the exemption had become final to contest it.

Petitioners sought administrative reconsideration. In response, the ICC issued a second decision in January 1988, in which it clarified and reaffirmed *Sierra I*. It explained that, in deciding whether to revoke an exemption under 49 U.S.C. 10505(d), it would balance concerns of finality, repose, and detrimental reliance against whatever factors favor reopening. Pet. App. 19a-20a. The ICC explained that reopening was unjustified here, because all parties had actual or constructive notice of the abandonment and had slept on their rights. *Id.* at 21a-23a.

4. The court of appeals dismissed petitioners' petition for judicial review for lack of jurisdiction. Pet. App. 1a-12a. The court concluded that it could not review Sierra's original exemption authority (issued by the ICC in February 1985) because petitioners had not met the 60-day time limit in 28 U.S.C. 2344 for seeking review of ICC decisions. Pet. App. 4a-5a. With respect to the ICC's 1987 and 1988 decisions denying petitioners' reopening request, the court ruled that the petition to reopen was based on a claim of material error, not new evidence or changed circumstances. *Id.* at 5a-12a.[9] Applying the principles of *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987), therefore, the court of appeals concluded that the "petition for review presents no issue reviewable by th[e] court." Pet. App. 12a.

The court of appeals also rejected petitioners' argument that "the notice provisions in the ICC exempt abandonment

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[9] The court explained that petitioners' historic-preservation claims were simply "newly raised." Pet. App. 6a-7a.

procedure were inadequate, and thus [had] deprived Friends of the opportunity to present its evidence on direct appeal of the original order." Pet. App. 7a. The court upheld the *Federal Register* notice in this case as "legally sufficient notice to all interested or affected persons regardless of actual knowledge or hardship resulting from ignorance." *Id.* at 8a-9a. Noting petitioners' complaint that the *Federal Register* is not generally available in Jamestown, California, where petitioners are located, the court stated that the adequacy of notice "does not hinge on the driving distance between copies of the Federal Register and the headquarters of potentially interested parties to agency proceedings." Pet. App. 8a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Thus no further review is warranted.

1. Petitioners contend (Pet. 13-23) that the court of appeals erred in holding that it lacked jurisdiction to review the ICC's decisions in this case. That contention, however, is foreclosed by the plain terms of the Hobbs Act, 28 U.S.C. 2341 *et seq.*, and this Court's decision in *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987).

The Hobbs Act provides for judicial review of ICC decisions. It states that any "party aggrieved by the final order [of the Commission] may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies." 28 U.S.C. 2344. The Commission's original action allowing Sierra to abandon its line was final on February 1, 1985. See Pet. App. 3a. But petitioners did not file a petition for review in the Ninth Circuit until September 2, 1987, well outside the 60-day period. Thus there can be no doubt that the court of appeals had no

jurisdiction to review the Commission's original exemption action.

Petitioners, however, did meet the Hobbs Act's 60-day limit for seeking review of the ICC's order of July 20, 1987, in which the Commission denied the request to reopen and reconsider its 1985 action. But this Court's opinion in *ICC* v. *Brotherhood of Locomotive Engineers*, *supra*, makes it clear that the appellate court did not have jurisdiction to review the ICC's decision not to reopen the question of Sierra's abandonment of its line. In *Locomotive Engineers*, the Court reviewed the relevant statutes, *e.g.*, 49 U.S.C. 10327(g), and held that a court of appeals has jurisdiction to review the denial of a petition to reopen an ICC proceeding only if "the petition that was denied sought reopening on the basis of new evidence or changed circumstances." 482 U.S. at 284. A petition to reopen on the ground that the ICC made a "material error" in its decision is not reviewable. *Id.* at 280.

Here, the court of appeals correctly ruled that petitioners did not seek to reopen the 1985 proceeding on the basis of new evidence or changed circumstances. Rather, petitioners simply maintained (and still do) that the Commission committed errors in 1985 when it authorized Sierra to abandonment its line.[10] In essence, petitioners contended that the Commission's exemption action was wrong at the time it was taken because the Commission failed to comply with the environmental-review requirements of NEPA and NHPA.[11] Accordingly, because the petition to reopen was not based on new evidence or changed circumstances—a

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[10] Much of the petition in this Court (*e.g.*, Pet. 23-25) is an attempt to reiterate such claimed errors.

[11] Petitioners' contention (Pet. 23) that the Commission's action was "void *ab initio*" is just another way to say the Commission committed a material error when it took its action.

point that we do not understand petitioners to contest at this time—the court of appeals properly dismissed the petition for judicial review. Accord *Advance Transp. Co.* v. *United States*, 884 F.2d 303 (7th Cir. 1989).

2. Petitioners maintain (Pet. 13-17, 21-23) that they are not bound by the terms of the Hobbs Act and the *Locomotive Engineers* decision because the ICC's notice of its action in 1985 violated petitioners' constitutional right not to be deprived of property without due process. In other words, petitioners argue that the Due Process Clause requires the Hobbs Act to be construed to allow jurisdiction in this case. That argument is contrary to the decisions of this Court and many courts of appeals.[12]

In this case, the ICC gave notice of its intent to permit abandonment by publishing a notice of exemption in the *Federal Register*, 50 Fed. Reg. 188 (1985).[13] See Pet. App. 3a. At the same time, the ICC sent copies of the notice to the Governor of California and many California state agencies.[14] This Court's decision in *Lyng* v. *Payne*, 476

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[12] Petitioners do not identify their "property rights" that are protected by the Due Process Clause. In fact, they may not have lost any such property right as a result of the ICC's action. See *Callaway* v. *Block*, 763 F.2d 1283, 1290 (8th Cir. 1985) (farmers did not have property interests in the government's peanut quotas). But as we explain in the text, even if petitioners were deprived of protected property rights, the Due Process Clause was satisfied by the ICC's notice in this case.

[13] The notice described the proposed action and invited interested parties to address environmental, energy, and public use concerns. Pet. App. 29a-30a.

[14] Petitioners claim (Pet. 6-8) that, in an earlier proceeding involving Sierra, an ICC staff member promised to advise locally interested parties of any actions affecting Sierra's lines. As the Commission explained, however, "[t]o charge the Commission with knowledge in each case involving a particular carrier with matters outside that case because they were before the agency at one time would be an unrealistic and impossible burden." Pet. App. 18a n.7.

U.S. 926 (1986), makes it clear that such notice was sufficient under the Due Process Clause. In that case, the Court considered a claim that the Farmers Home Administration failed to publicize adequately the availability of certain low-interest loans. The Court, after assuming that the plaintiffs had been deprived of a property interest, held that the "notice published in the Federal Register * * * was more than ample to satisfy any due process concerns." *Id.* at 942. Accord 44 U.S.C. 1507 (publication in Federal Register "is sufficient to give notice of the contents of the document to a person subject to or affected by it"); *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 384-385 (1947) (Wheat crop insurance regulations were binding after they were published in the *Federal Register* regardless of actual knowledge of the regulations).

Contrary to petitioners' suggestion (Pet. 16), no court of appeals has held that notice of administrative action in the Federal Register is inadequate to protect the rights of the general public.[15] In the two cases that petitioners cite, the courts held that a particular statute (not the Constitution) required more notice than publication in the *Federal Register*. See *Matzke* v. *Block*, 732 F.2d 799 (10th Cir. 1984) (relying on 7 U.S.C. 1981a); *Allison* v. *Block*, 723 F.2d 631 (8th Cir. 1983) (same). Indeed, every circuit that has considered the question of notice in administrative proceedings of the type at issue here has held that publication in the *Federal Register* satisfies the Due Process Clause. See, *e.g.*, *Bennett* v. *Director, Office of Workers' Compensation Programs*, 717 F.2d 1167, 1169-1170 (7th Cir. 1983); *North Alabama Express, Inc.* v. *United States*, 585 F.2d 783,

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[15] In any event, the ICC in this case did more than publish its notice in the *Federal Register*. It sent copies to the entities most likely interested—the Governor of California and various state agencies, including the State Historic Preservation Office.

789-790 (5th Cir. 1978) (requiring Federal Register notice to be clear); *Bank of Commerce* v. *Board of Governors*, 513 F.2d 164, 166-167 (10th Cir. 1975); *Pearson* v. *Walling*, 138 F.2d 655, 660 (8th Cir.), cert. denied, 321 U.S. 775 (1943). Accordingly, the court of appeals correctly applied the terms of the Hobbs Act, as interpreted by this Court in *Locomotive Engineers*, and dismissed petitioners' case for lack of jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1990

U.S. GOVERNMENT PRINTING OFFICE 1989—262-203/00720

MOTION FILED
JAN 2 1990

No. 89-701

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

TUOLUMNE PARK AND RECREATION DISTRICT, and FRIENDS OF SIERRA RAILROAD, INC., *Petitioners*,

v.

INTERSTATE COMMERCE COMMISSION, *et al.*, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES, RAILS-TO-TRAILS CONSERVANCY, CALIFORNIA PRESERVATION FOUNDATION, SOCIETY FOR HISTORICAL ARCHAEOLOGY, SOCIETY FOR CALIFORNIA ARCHAEOLOGY, AND TUOLUMNE COUNTY HISTORICAL SOCIETY, AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit's refusal to exercise jurisdiction over a timely petition to review the Interstate Commerce Commission's conceded failure to comply with its non-discretionary duties under the National Environmental Policy Act (NEPA), and Section 106 of the National Historic Preservation Act (NHPA), wrongfully forecloses judicial review of agency compliance with these mandatory environmental statutes, in contravention of Congress' grant of private enforcement authority under the NHPA and NEPA, and the judicial policy favoring a "searching" standard of review for agency decisions to avoid compliance with environmental review statutes?

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MOTION OF THE NATIONAL TRUST FOR HISTORIC PRESERVATION, *ET AL.* FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The National Trust for Historic Preservation in the United States, Rails-to-Trails Conservancy, California Preservation Foundation, Society for Historical Archaeology, Society for California Archaeology, and Tuolumne County Historical Society, respectively petition this Court pursuant to Rule 36.3 for leave to file an *amicus curiae* brief, filed simultaneously herewith, in support of Petitioners in the above-captioned Petition for Writ of Certiorari to the Ninth Circuit.[1]

The Solicitor General of the United States has consented on behalf of Respondent Interstate Commerce Commission ("ICC") to the filing of this brief, as have the Petitioners Friends of Sierra Railroad and Tuolumne Park and Recreation District, as evidenced by letters filed with the Clerk of this Court. However, Respondent Fibreboard Corporation has declined to grant consent to the filing of this *amicus* brief, necessitating this motion.

The National Trust's expertise on federal historic preservation law is nationally recognized, particularly with respect to Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f. The National Trust has frequently filed *amicus* briefs (and has participated as a plaintiff) in cases involving the enforce-

[1] The interests of the *amici* organizations are described more fully in the Appendix to this *Amicus* Brief in Support of the Petition for a Writ of Certiorari. (Amicus App. 1a)

ment and interpretation of Section 106.[2] Thus, the filing of an *amicus* brief will assist this Court in evaluating the significant issues involved in this case, particularly the issues concerning compliance with the National Historic Preservation Act, which has never heretofore been reviewed by this Court.

Respectfully submitted,

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[2] For example, the National Trust has participated as a plaintiff or *amicus* in the following cases involving Section 106 of the NHPA: *Vieux Carre Property Owners, Residents & Associates, Inc. v. Brown*, 875 F.2d 453 (5th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3291 (U.S. Oct. 6, 1989) (No. 89-563) (*amicus* in support of cert. petition); *Lee v. Thornburgh*, 877 F.2d 1053 (D.C. Cir. 1989) (*amicus*); *Connecticut Trust for Historic Preservation v. Interstate Commerce Commission*, 841 F.2d 479 (2d Cir. 1988) (*amicus*); *National Trust for Historic Preservation v. U.S. Army Corps of Engineers*, 552 F. Supp. 784 (S.D. Ohio 1982) (plaintiff).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-701

TUOLUMNE PARK AND RECREATION DISTRICT, and FRIENDS OF SIERRA RAILROAD, INC.,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Respondents.

AMICUS BRIEF OF THE NATIONAL TRUST FOR HISTORIC PRESERVATION, RAILS-TO-TRAILS CONSERVANCY, CALIFORNIA PRESERVATION FOUNDATION, SOCIETY FOR HISTORICAL ARCHAEOLOGY, SOCIETY FOR CALIFORNIA ARCHAEOLOGY, AND TUOLUMNE COUNTY HISTORICAL SOCIETY IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTERESTS OF *AMICI CURIAE*

This brief is submitted by the National Trust for Historic Preservation in the United States, Rails-to-Trails Conservancy, California Preservation Foundation, Society for Historical Archaeology, Society for California Archaeology, and Tuolumne County Historical Society, as *amici curiae* pursuant to Rule 36.1 of the Rules of this Court, in support of the petition for a writ of certiorari to the United States Court of

Appeals for the Ninth Circuit. Consent to appear as *amici* has been obtained from the United States and from the petitioners, Friends of Sierra Railroad and Tuolumne Park and Recreation District, as evidenced by letters filed with the Clerk of this Court.

The Interstate Commerce Commission ("ICC") authorizes the abandonment of approximately 3000 miles of railroad lines each year. Many of these corridors either include or are adjacent to historic sites, such as archaeological sites, stone bridges, railroad depots, and other historic structures, or, as is the case here, are historically significant in their own right. *Amici* are national, state, and local organizations concerned with protecting these historic resources and enforcing federal agency compliance with the National Historic Preservation Act ("NHPA"), 16 U.S.C. §§ 470 *et seq.*, and the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332. The interests of *amici* in the strong enforcement of federal environmental and historic preservation laws have been hampered by the conflicting and uncertain legal standards governing judicial review of the ICC and other licensing agencies subject to special review statutes, when those agencies fail to comply with environmental and historic preservation laws.[1]

The purpose of this *amicus* brief is to urge this Court to resolve this ongoing enforcement problem, an issue that is well-illustrated in this case, in which judicial review of the ICC's conceded failure to comply with the mandatory environmental review obligations of the NHPA and NEPA was wrongfully foreclosed,

[1] The interests of each *amicus curiae* are described in more detail in the Appendix to this brief. (Amicus App. 1a).

a result that subverts the legislative mandate of these important statutes.

STATEMENT OF THE CASE

A. Introduction

This case presents the question of whether Petitioners were deprived of adequate judicial review of the Interstate Commerce Commission's (ICC's) conceded failure[2] to engage in the environmental consultation and review processes mandated by NEPA, 42 U.S.C. § 4332, and Section 106 of the National Historic Preservation Act ("Section 106"), 16 U.S.C. § 470f, prior to authorizing the abandonment of the scenic and historic Sierra Railroad under the ICC's "exempt" railroad abandonment procedures.[3] In refusing to take jurisdiction over this case, the Ninth Circuit improperly deferred to the ICC's erroneous conclusion that the cursory notice required under the ICC's exempt abandonment regulations was sufficient to satisfy the notice requirements of NEPA and Section 106. The Ninth Circuit's refusal to review the ICC's unlawful action in this case underscores the need for this Court to review the unsettled questions

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[2] *See S.R. Investors, Ltd.—Abandonment—in Tuolumne County, CA*, Dkt. No. AB-239X (ICC, July 14, 1987), at 10 (Pet. App. 31a, 48a).

[3] These procedures allow certain railroads that have been out of service for more than two years to abandon their rights-of-way by using an accelerated procedure, under which the only notice provided to the public is through a general-purpose form sent to state public service agencies and published in the Federal Register. 49 U.S.C. § 10505; 49 C.F.R. § 1152.50.

over which the circuits are divided[4] regarding the adequacy of appellate judicial review where agencies subject to special review statutes such as the Hobbs Act, 28 U.S.C. § 2342, violate their clear, non-discretionary duties to comply with Section 106 and NEPA.

B. Statutory Background

NEPA and Section 106 impose important, mandatory obligations on federal agencies to evaluate the impact of federally-licensed activities on the environment and on historic properties before allowing actions that are potentially harmful to those resources to go forward. While "the agency is not constrained . . . from deciding that other values outweigh the environmental costs," compliance with NEPA's procedural requirements is not discretionary. *Robertson v. Methow Valley Citizens Council*, 109 S. Ct. 1835, 1846 (1989); *Baltimore Gas and Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97-98 (1983).

In addition to its function of providing relevant environmental information to government decisionmakers, NEPA also "guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Robertson v. Methow Valley Citizens Council*, 109 S. Ct. at 1845. Under NEPA, the public is provided with the required notice through the prep-

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[4] *Compare Bywater Neighborhood Ass'n v. Tricarico*, 879 F.2d 165 (5th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3397 (U.S. Dec. 6, 1989) (No. 89-898) *with Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231 (3d Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981).

aration and broad dissemination of an environmental assessment (EA) or an environmental impact statement (EIS), "which gives the public the assurance that the agency 'has indeed considered environmental concerns in its decisionmaking process,' . . . and, perhaps more significantly, provides a springboard for public comment." *Id.* (quoting *Baltimore Gas and Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. at 97); *see also Illinois Commerce Commission v. ICC*, 848 F.2d 1246, 1260 (D.C. Cir. 1988), *cert. denied*, 109 S. Ct. 783 (1989) ("The EA or EIS should provide a springboard for public comment, bringing to the agency viewpoints and options it might otherwise lack."). Dissemination of an EA or an EIS also serves the function of offering state and local governmental bodies "adequate notice of the expected consequences and the opportunity to plan and implement corrective measures in a timely manner." *Robertson v. Methow Valley Citizens Council*, 109 S. Ct. at 1846.

Like NEPA, Section 106 contemplates public notification and involvement in order to assist the agency in assessing the effects of its actions on historic properties and in considering mitigation measures. Under Section 106, where a federally licensed project or activity could affect historic properties, the agency must issue a formal assessment of the impact on historic properties, which assessment must be made in consultation with the State Historic Preservation Officer ("SHPO")[5] and the Advisory Council on His-

[5] The SHPO is the official in each state responsible for assisting federal agencies in carrying out their historic preservation responsibilities in the Section 106 consultation process, 36 C.F.R. § 800.1(c).

toric Preservation. 36 C.F.R. §§ 800.5, 800.6, 800.8. When the effect of the undertaking on historic properties will be adverse, the agency must consider ways in which this effect can be avoided or mitigated, and must "provide an adequate opportunity for members of the public to receive information and express their views, *id.* § 800.5(e)(3), and to participate as interested or consulting parties in this process. *Id.* § 800.5(e).[6]

The role of citizens acting as private attorneys general to enforce agency compliance with NEPA and Section 106 is well-established. Indeed, Congress has created an express, private right of action for "any citizen" to enforce the provisions of the National Historic Preservation Act. 16 U.S.C. § 470w-4; *see Vieux Carré Property Owners, Residents & Associates, Inc. v. Brown*, 875 F.2d 453, 457-58 (5th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3291 (U.S. Oct. 6, 1989) (No. 89-563).

NEPA enforcement actions are generally brought in two contexts: challenges to the sufficiency of an agency's consideration of impacts and alternatives, and challenges to an agency's refusal or failure to comply with NEPA at all. In reviewing the former,

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[6] If the agency determines that the action will have no effect on historic properties, that finding must be documented and transmitted to the SHPO, who has 15 days to object to the finding. *Id.* § 800.5(b). The agency must also notify "interested persons who have made their concerns known" to the agency. *Id.* If the agency determines that an action would have no *adverse* affect on historic properties, this finding must be documented and submitted to both the SHPO and the Advisory Council on Historic Preservation, which has 30 days to object to the finding. *Id.* § 800.5(d).

courts have applied a more deferential, "arbitrary and capricious" standard. *See Baltimore Gas and Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. at 97-98. However, judicial review of an agency's failure to assess environmental impacts in the first instance, as occurred here, is generally "subject to inspection under a more searching standard," recognizing that "[t]he spirit of [NEPA] would die aborning if a facile, ex parte decision that the project was minor or did not significantly affect the environment were too well shielded from impartial review." *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 466 (5th Cir. 1973). *Accord, Foundation for North American Wild Sheep v. United States Dep't of Agriculture*, 681 F.2d 1172, 1177-78 (9th Cir. 1982).

C. History of the ICC's "Exempt" Abandonment Procedures

The ICC's "exempt" abandonment procedures involved in this case are applicable to railroads on which no local traffic has moved for at least two years, based on the ICC's determination that these rail lines do not require prior ICC review and approval to carry out national rail transportation policies. 49 C.F.R. § 1152.50. Carriers falling within this exemption may abandon their lines simply by providing "notice of exemption" to the ICC. Within 20 days after receiving the carrier's notice of exemption, the ICC must publish a notice of the abandonment in the Federal Register. *Id.* § 1152.50(d)(3). Today, the vast majority of railroad abandonments are processed through the ICC's "exempt" abandonment procedures.[7]

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[7] Interstate Commerce Commission, 1988 Annual Report, at 129 (1989) (more than 70 percent of all abandonments are pursuant to "exempt" procedures).

Since their adoption, the ICC's "exempt" abandonment regulations have been a source of controversy over the question of whether they allow abandonments to go forward without providing adequate public notice and opportunity to raise environmental and historic preservation concerns under Section 106 and NEPA. These concerns are rooted in the fact that the "exempt" abandonment procedures, on their face, allow railroad lines to be abandoned without preparation of an EA or an EIS, and instead only require that the railroad serve on certain state agencies an invitation to raise "relevant environmental and energy" concerns. *Id.* § 1105.11 (Appendix). Environmental objections may be raised by the public only after the fact, in the form of a petition to stay the abandonment, which must be filed within 10 days after publication of the notice of abandonment in the Federal Register, or in the form of a petition for reconsideration, which must be filed within 20 days of the Federal Register notice. *Id.* § 1152.50(d).

The Council on Environmental Quality (CEQ) has expressly found that the ICC's exempt abandonment procedures conflict with the requirements of NEPA by failing to provide adequate public notice of the abandonment and by "shift[ing] to intervenors a large part of the burden of evaluating environmental issues which Congress placed on agencies of the government such as the ICC when it passed NEPA."[8] Likewise, the Advisory Council on Historic Preservation has determined that these procedures violate Section 106 by allowing abandonments to go forward without con-

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[8] Letter from Dinah S. Bear, General Counsel, CEQ, to Robert S. Burk, ICC (Dec. 18, 1987) (Amicus App. 3a, 5a).

sulting with the State Historic Preservation Officer or providing the Advisory Council an opportunity to comment on the undertaking.[9] Even within the ICC, the exempt abandonment procedures have been criticized for failing to provide advance notice to the public sufficient to satisfy the statutory requirements of Section 106 and NEPA.[10]

These concerns regarding the incompatibility of the ICC's exempt abandonment procedures with NEPA and NHPA were raised before the D.C. Circuit in a direct challenge to the regulations, in *Illinois Commerce Commission v. ICC*, 848 F.2d 1246 (D.C. Cir. 1988), *cert. denied*, 109 S. Ct. 783 (1989). In its decision, the D.C. Circuit expressed grave concerns about whether the procedures for abandoning railroads under these regulations conflicted with the public notice and participation requirements of NEPA and the NHPA, stating

> A railroad seeking an abandonment exemption must notify the state public service commission

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[9] Findings of a Panel of Advisory Council Members Convened on December 4th, 1987 to Consider Whether the Interstate Commerce Commission (ICC) Has Foreclosed the Council's Opportunity to Comment, in Violation of Section 106 of the National Historic Preservation Act, in Permitting the Exempt Abandonment of the Canal Branch of the Boston and Maine Railroad to Become Final in Accordance with 49 CFR § 1152.50. (Amicus App. 7a, 9a).

[10] *See* Memorandum from William R. Southard, Office of Transportation Analysis, ICC, to Donald Shaw, Office of Proceedings, ICC (July 31, 1986) (Pet. App. 59a) ("Given the very accelerated processing schedule involved in exempt proceedings, state historic preservation offices seldom become aware of railroad abandonment exemption proposals").

> ten days prior to filing the exemption provision. . . . *No EA would be available at that time, though, and so the usefulness of such notice to environmental groups is limited.* The Commission, moreover, does not advance any evidence that state public service agencies will perform this service, and, in fact, the Commission's own staff in comments concerning another exempt proceeding suggest that the state agencies do not carry out this function very well.

Id. at 1260 (emphasis added). The D.C. Circuit also recognized that "the Commission's reliance on private parties to raise environmental concerns was unlawful. The Commission may not delegate to parties and intervenors its own responsibility to independently investigate and assess the environmental impact of the proposal before it." *Id.* at 1258.

Notwithstanding these concerns, the D.C. Circuit declined to invalidate the regulations on their face, based on the ICC's simultaneous issuance of a statement promising to make environmental assessments available to the public before exempt abandonments were authorized, *id.* at 1258 n.23, and based on the ICC's verbal assurances at oral argument that it would allow 15 days from completion of the EA for intervenors to seek a stay, and that it would automatically grant a stay, if requested, until environmental concerns are resolved. The D.C. Circuit found that these procedures, if followed, would "obviate[ ] the possibility that abandonments would be authorized even though environmental questions were still outstanding." *Id.* at 1260. However, the court expressly stated that "[n]othing we decide here . . . affects the rights of these Petitioners or any others to challenge

the adequacy of the Commission's procedures as applied to a particular abandonment." *Id.* at 1258.

It is clear from the D.C. Circuit's decision that the exempt abandonment regulations would have been invalidated on their face but for the ICC's verbal assurances and unpublished policy statements that "exempt" abandonments will be carried out consistent with the NHPA and NEPA. Given this tenuous basis for the D.C. Circuit's decision, it is imperative that the ICC's case-by-case application of these regulations be subject to careful and exacting judicial review.

Yet here, the Ninth Circuit refused even to exercise jurisdiction over the ICC's conceded failure to apply its regulations consistent with its NEPA and Section 106 obligations. Not only did the ICC fail to provide an environmental assessment within five days of publishing the notice of abandonment in the Federal Register, but it also refused to automatically stay the abandonment until all environmental concerns were resolved—thus ignoring the very procedural assurances that saved the regulations from facial invalidity before the D.C. Circuit in *Illinois Commerce Commission v. ICC*.

Thus, the Ninth Circuit's decision has effectively insulated the ICC from any review at all precisely where judicial review is needed most. Review by this Court is necessary to resolve this tension between the mandatory commands of the NHPA and NEPA, and the limitations on judicial review afforded to the decisions of licensing agencies such as the ICC.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit Erred in Denying Judicial Review of the ICC's Conceded Failure to Comply with Its Non-Discretionary Duties Under NEPA and Section 106.

This case clearly shows that the ICC, despite its assurances to the D.C. Circuit in *Illinois Commerce Commission v. ICC*, has failed to carry out its "exempt" abandonment proceedings consistent with the commands of NEPA and Section 106. The ICC has conceded in this case that it failed to comply with the requirements of NEPA and Section 106 that an environmental review and assessment document be prepared and circulated to the public and the appropriate agencies with sufficient time for meaningful comment prior to authorizing the abandonment of the Sierra Railroad.[11] And yet, incredibly, the ICC refused the requests made by the California State Historic Preservation Officer and the Advisory Council on Historic Preservation as well as by Petitioners to reopen the abandonment proceeding in order to comply with these statutes, on the ground that "Friends [of Sierra Railroad], the SHPO, and other California agencies all slept on their rights" by failing to raise their objections before the abandonment was approved.[12]

The most troublesome aspect of this case is not the ICC's legal error itself, but rather, the Ninth Circuit's failure to exercise jurisdiction in order to review it. Notwithstanding the ICC's admission that it failed to

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[11] *See S.R. Investors, Ltd.—Abandonment—in Tuolumne County, CA*, Dkt. No. AB-239X (ICC, July 14, 1987), at 10 (Pet. App. 31a, 48a).

[12] *Id.* (Pet. App. 48a).

comply with NEPA and Section 106, the Ninth Circuit held that Petitioners had received "adequate" notice of the abandonment, as defined by the ICC's flawed exempt abandonment regulations, and therefore that the preclusive doctrine of *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987), rendered the ICC's noncompliance unreviewable.[13]

The Ninth Circuit erred in relying on the ICC's finding that the cursory, general purpose notice provided by the ICC to state public service agencies was legally sufficient to place Petitioners on notice of their opportunity to raise objections under NEPA and Section 106. It clearly was not. Even if this "notice" was adequate to trigger the public's opportunity to intervene on a timely basis to request a public use condition under the Revised Interstate Commerce Act, 49 U.S.C. § 10906, such "notice" is an impermissible substitute for the notice required by NEPA and Section 106—the preparation of an EA or an EIS, and transmittal of the required assessment of effects on historic properties to the California State Historic Preservation Officer and the Advisory Council on Historic Preservation. Until these documents are prepared and transmitted to the appropriate officials and

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[13] As the Ninth Circuit implicitly recognized below, *I.C.C. v. Brotherhood of Locomotive Engineers*, alone, does not purport to foreclose judicial review of the ICC's clearly erroneous refusal to reopen a proceeding, where the party seeking to reopen the proceeding did not have an adequate opportunity to raise these allegations in the original proceeding. Rather, this Court's decision in *Locomotive Engineers* reflects a concern that a rule not be fashioned to deprive a party "of all opportunity for judicial consideration—even on a 'clearest abuse of discretion' basis—of facts which, through no fault of his, the original proceeding did not contain." 482 U.S. at 280.

interested persons, the Petitioners by law did not receive legally sufficient notice of the abandonment. Any other result would permit the ICC to "shift[ ] to intervenors a large part of the burden of evaluating environmental issues which Congress placed on agencies of the government such as the ICC when it passed NEPA," by placing the burden on Petitioners to raise environmental objections *before* the ICC has prepared the necessary environmental review documents. *Harlem Valley Transportation Association v. Stafford*, 500 F.2d 328, 336 (2d Cir. 1974).[14] Thus, the ICC's determination, deferred to by the Ninth Circuit, that Petitioners "slept on their rights" to raise environmental objections, cannot be squared with the ICC's concession that Petitioners received no legally sufficient notice of those rights under NEPA and Section 106. (*See* Pet. App. 48a).

Ironically, the Ninth Circuit's refusal to review these NEPA and Section 106 violations has effectively foreclosed judicial review of the ICC's failure to comply with NEPA and Section 106 precisely where it is needed most—where the agency evades its environmental review obligations altogether. Insulating these clearly unlawful agency actions from judicial review subverts the basic policy that agency decisions not to comply with NEPA in the first instance should be subject to a "more searching standard" of judicial review than that applied to the adequacy of an agen-

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[14] In *Harlem Valley Transp. Ass'n v. Stafford*, the Second Circuit invalidated the ICC's procedures for complying with NEPA in its traditional (i.e., not "exempt") railroad abandonment proceedings because the ICC prepared environmental assessments only in response to public objections rather than using the environmental assessment process to elicit public comment.

cy's NEPA compliance, since decisions to avoid the assessment of impacts altogether "pretermit[ ] all consideration of that which Congress has directed be considered 'to the fullest extent possible.' " *Save Our Ten Acres v. Kreger*, 472 F.2d at 466. *Accord*, *Foundation for North American Wild Sheep v. United States Dep't of Agriculture*, 681 F.2d 1172, 1177-78 (9th Cir. 1982).[15]

II. This Court's Review Is Needed to Clarify the Unsettled Law Regarding Judicial Review Where "Hobbs Act" Agencies Violate Clear, Non-Discretionary Duties Under NEPA and Section 106.

The Ninth Circuit's ruling underscores a pervasive problem regarding the adequacy of judicial review of violations of NEPA and Section 106 by agencies such as the ICC that are subject to special review statutes, vesting exclusive review of agency actions in the courts of appeals.[16] The unsettled nature of the law in this context is well-illustrated by *Bywater Neighborhood Ass'n v. Tricarico*, 879 F.2d 165 (5th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3397 (U.S. Dec. 6, 1989) (No. 89-898). In that case, the Fifth Circuit held that the federal district court did not have jurisdiction to review a claim that the Federal

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[15] *But see Gee v. Hudson*, 746 F.2d 1471 (4th Cir. 1984), *cert. denied*, 471 U.S. 1058 (1985) (White, J., dissenting); *River Road Alliance, Inc. v. Corps of Engineers*, 764 F.2d 445 (7th Cir. 1985), *cert. denied*, 475 U.S. 1055 (1986) (White, J., dissenting).

[16] The ICC is subject to the Administrative Orders Review Act, 28 U.S.C. § 2342 (the "Hobbs Act"), which vests in the courts of appeals exclusive jurisdiction to review final "orders" of the ICC, the Federal Communications Commission, the Nuclear Regulatory Commission, and certain orders of the Secretary of Agriculture and the Federal Maritime Commission.

Communications Commission (FCC) failed to comply with Section 106 and NEPA in permitting the construction of several communications facilities in the center of the Bywater Historic District in New Orleans, since exclusive review of FCC licensing decisions was vested in the court of appeals. Instead, the court directed the plaintiff to file discretionary, after-the-fact petitions raising environmental objections with the agency, even though the environmental impacts had already occurred.[17]

As the Ninth Circuit's decision shows, the route prescribed by the Fifth Circuit in *Bywater*, by which "Hobbs Act" agencies must obtain judicial review of the agency's failure to comply with NEPA and Section 106, does not lead to meaningful judicial review but instead, has the result of foreclosing judicial review altogether. This problem is particularly acute where the agency's noncompliance with NEPA and Section 106 itself prevents public interest intervenors from raising environmental objections within the limited time-frames established by the agency.

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[17] *But see Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231 (3d Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981), in which the Third Circuit held that the federal district court did have jurisdiction to review plaintiff's claim that the Nuclear Regulatory Commission (NRC) had failed to comply with NEPA prior to authorizing a nuclear power plant to discharge radioactive water into the Susquehanna River. However, in dissenting from the denial of the petition for certiorari, Justice Rehnquist argued that enforcement should have been sought initially with the agency, and then reviewed directly by the court of appeals. *General Public Utilities Corp. v. Susquehanna Valley Alliance*, 449 U.S. at 1099 (Rehnquist, J., dissenting) (citing *City of Rochester v. Bond*, 603 F.2d 927, 936-37 (D.C. Cir. 1979)).

Moreover, in such licensing proceedings, the sole opportunity to raise environmental objections is in the context of discretionary petitions to reopen the proceeding or requests for enforcement action. If judicial review of such discretionary actions is not barred altogether,[18] the scope of appellate review will often be prejudicially narrowed by the fact that the agency's regulations place the court in the position of reviewing a discretionary decision—i.e., the agency's disposition of a petition to stay, reconsider, or reopen the proceeding—rather than reviewing the agency's *non*-discretionary duties to comply with NEPA and Section 106. As the court noted in *Izaak Walton League v. Schlesinger*, 337 F. Supp. 287 (D.D.C. 1971):[19]

> Review of discretionary acts is more limited than agency actions that are compelled by statute. If plaintiffs' request to become parties before the AEC was denied their cry of failure to comply with NEPA would be unadjudicated. *Therefore, the Court may never be afforded opportunity to pass on the issue of whether the AEC failed to comply with the statutory mandate of NEPA.*

Id. at 293 (footnote omitted) (emphasis added).

When viewed together, the Fifth and Ninth Circuits have effectively foreclosed any judicial review of Section 106 and NEPA compliance by licensing agencies subject to special review statutes, thereby undermining Congress' express grant of private enforcement au-

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[18] *Cf. Heckler v. Chaney*, 470 U.S. 821 (1985).

[19] *Schlesinger* held that the district court had jurisdiction to review claims that the Atomic Energy Commission failed to comply with NEPA when it allowed interim operation of a nuclear power plant.

thority under the NHPA, 16 U.S.C. § 470w-4, and the strong judicial policy favoring private enforcement of NEPA. Accordingly, this Court's review is needed to clarify the important questions of the adequacy of judicial review when Hobbs Act agencies fail to comply with their mandatory obligations under NEPA and Section 106, and to halt the growing trend of now two circuits, the Fifth and the Ninth, to foreclose judicial review where a licensing agency completely avoids compliance with these important environmental review statutes.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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January 2, 1990

APPENDIX

APPENDIX

Interests of *Amici Curiae* Organizations

National Trust for Historic Preservation

The National Trust for Historic Preservation in the United States was chartered by Congress in 1949 as a private, nonprofit organization, to promote public involvement in the protection of America's historic resources and to further the historic preservation policy of the United States. *See* 16 U.S.C. § 468, 461-467. The National Trust currently has more than 225,000 individual and 3000 organizational members nationwide. The National Trust's Chairman is by statute a member of the Advisory Council on Historic Preservation, *id.* § 470i(a)(i)(8), an independent federal agency, which is responsible for implementing the National Historic Preservation Act ("NHPA"), 16 U.S.C. §§ 470 *et seq.*, and for commenting on federal undertakings affecting historic resources. *See id.* §§ 470s, 470f. The Advisory Council's duties also include reviewing the policies and programs of other federal agencies to ensure consistency with the historic preservation policies adopted by Congress. *See id.* §§ 470, 470j.

Rails-to-Trails Conservancy

The Rails-to-Trails Conservancy is a nonprofit public interest corporation with approximately 60,000 members dedicated to fostering the preservation of abandoned and about-to-be-abandoned railroad rights-of-way for continued present and future public use, including for recreational trails and other compatible uses, and railbanking.

California Preservation Foundation

The California Preservation Foundation is a California nonprofit corporation dedicated to promoting historic preservation through awareness and education. The foundation, a statewide group with over 1,000 individual and organizational members, assists local and regional groups

throughout California. The California Preservation Foundation has been active for many years in assisting the efforts to save the Sierra Railroad.

Society for Historical Archaeology

The Society for Historical Archaeology is a nonprofit scientific and educational organization with more than 2000 members, which aims to promote scholarly research and dissemination of knowledge concerning historical archaeology. The Society is specifically concerned with the identification, interpretation, and conservation of sites and materials on land and under water.

Society for California Archaeology

The Society for California Archaeology is a nonprofit scientific and educational corporation with a membership of over 600 professional archaeologists, students, and avocationals in California, dedicated to the study and preservation of heritage resources, both historic and prehistoric.

Tuolumne County Historical Society

The Tuolumne County Historical Society was established in 1956 as a nonprofit corporation chartered to "record, preserve, protect, and disseminate" the history of Tuolumne County, California. The Society promotes and urges protection of the Sierra Railroad, which is historically significant in the economic, social, and political development of the county and the larger central Sierra Region.

EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY
722 Jackson Place, N.W.
Washington, D.C. 20503

December 18, 1987

Mr. Robert S. Burk
General Counsel
Interstate Commerce Commission
12th Street and Constitution Ave., N.W.
Washington, D.C. 20423

RE: Proposed Amendments to ICC Procedures Implementing the National Environmental Policy Act; Ex Parte No. 55 (Sub-No. 22A)

Dear Mr. Burk:

Last week, I met with Louis Mackall and Ellen Hansen of your office, as well as Carl Bausch, Chief of the ICC's Section of Energy and Environment, to discuss the above-captioned proposed amendments. As you may know, CEQ generally reviews an agency's proposed NEPA procedures or amendments to NEPA procedures in the initial draft stages, and works with the agency throughout the process. Prior to publication of procedures in final form in the Federal Register, CEQ issues, if appropriate, a letter indicating that the agency's procedures are consistent with the CEQ regulations.

During our meeting, I mentioned a number of concerns about the draft ICC procedures. Some of these are minor; others are more significant. Mr. Mackall suggested that I summarize these concerns in writing. I am hopeful that all of them can be resolved to the mutual satisfaction of CEQ and the ICC.

I understand that the ICC wishes to publishes [sic] the draft regulations in the Federal Register as soon as possible. While that it [sic] is certainly a matter of discretion

on the part of the ICC, I wanted to summarize for you my concerns about the current draft proposed amendments.

Timing of NEPA Compliance for Classes for Exempted Actions: The ICC maintains that it is not required to complete the NEPA process prior to publication of a notice of exemption for an action because the notice itself is not a decision; rather, it is a public information notice. The ICC argues that the "real" decision took place at the time the Commission determined to exempt certain classes of actions from normal regulation. If, the ICC says, someone raises an environmental issue in a timely manner, the proceeding will then be stayed and appropriate NEPA compliance will occur.

It appears to me that this line of argument is flawed and disingenuous. First, if the only decision point in the exemption process is the ICC's decision to designate a certain class of actions as exempt (which, whether it is the *only* decision point or not, I would certainly view as a decision), then one would expect the ICC to have fully and comprehensively complied with NEPA at that time. Instead, the ICC is apparently relying on an "environmental memorandum" prepared by the Section on Energy and Environment, which, the agency is [sic] argues, is the "functional equivalent" of a NEPA document. The "functional equivalent" doctrine applies *only* to certain activities of the Environmental Protection Agency (EPA) in administering certain environmental statutes. The doctrine has developed because of concern on the part of Congress and the courts that compliance with the procedural requirements of NEPA would delay EPA's implementation of statutes which were written for the purpose of environmental protection. It has been applied only to EPA, because of EPA's unique situation in the federal government in having an environmentally protective mission as its primary goal, and it is applied only to those statutes which provide for the "functional equivalent" of the NEPA proc-

ess (for example, analysis of alternatives and public participation). The courts have rejected attempts by other agencies to use the functional equivalence doctrine, even when part of an agency's mission is an environmental function. *Texas Committee on Natural Resources v. Bergland*, 573 F.2d 201 (5th Cir. 1978). The ICC's claim to the functional equivalent doctrine is, frankly, untenable.

Even assuming, however, that the ICC had properly analyzed the environmental impacts of its class exemption regulations in an environmental assessment or an environmental impact statement, the argument that the notice of exemption is not a decision is suspect. It appears to me that the rights of the parties involved in the action are determined by the notice unless someone intervenes. The fact that a proceeding may be stayed by a party raising environmental concerns demonstrates that there is an opportunity for the Commission to make an [sic] reasoned decision among alternative courses of actions. The ICC apparently believes that the very existence of this opportunity proves that there is adequate compliance with the environmental laws. However, this scheme also proves that there is a further decision point, at which point compliance with environmental statutes, including NEPA, is [sic] occurs only upon petition of an outside party. Thus, the agency appears to be reflecting much the same attitude as it did in 1974, when the Second Circuit Court of Appeals observed that:

> "The ICC is apparently content to place the burden on interveners whose resources might be limited to challenge any environmental statements that the railroads might make in their applications for abandonment. If interveners do not challenge these statements, they may be accepted as true. This passive approach by the Commission shifts to interveners a large part of the burden of evaluating environmental issues which Congress placed on agencies of the government such

as the ICC when it passed NEPA." *Harlem Valley v. Stafford*, 500 F.2d 328, 336 (2d Cir. 1974).

In our discussions on December 11, 1987, Mr. Mackall cited *Illinois Commerce Commission v. ICC*, 787 F.2d 616 (D.C. Cir. 1986), and *Crounse Corp. v. ICC*, 781 F.2d 1176 (6th Cir. 1986), as providing authority which approved the manner in which the ICC conducts its NEPA compliance for exempted classes of actions. Neither of these cases stand for the proposition cited. The first case does not even reference NEPA, but rather deals with challenges against the deregulation of abandonment actions for out-of-service lines based on other causes of action. *Crounse Corp. v. ICC* does include a NEPA cause of action, but the underlying action (an acquisition) was not in the exempted class, and the court, rather than dealing with the timing issue, merely held that the ICC's decision not to prepare an environmental impact statement, based upon the analysis in an environmental assessment, was adequate. In short, neither case supports the ICC's treatment of exempted actions under NEPA.

* * * *

I am aware that the ICC is currently in litigation which involves some of the issues raised in this letter; principally, those issues relating to overall NEPA compliance for exempted classes of action. This situation makes discussion of these matters rather more sensitive; however, the ICC's proposed amendment also makes the discussion imperative. I would be happy to meet with you to discuss these issues in further detail, or to continue working with your staff and the staff of the SEE.

Yours truly,

Dinah Bear
General Counsel

* * * *

Advisory Council On
Historic Preservation

The Old Post Office Building
1100 Pennsylvania Avenue, NW, # 809
Washington, DC 20004

FINDINGS OF A PANEL OF ADVISORY COUNCIL MEMBERS CONVENED ON DECEMBER 4TH, 1987 TO CONSIDER WHETHER THE INTERSTATE COMMERCE COMMISSION (ICC) HAS FORECLOSED THE COUNCIL'S OPPORTUNITY TO COMMENT, IN VIOLATION OF SECTION 106 OF THE NATIONAL HISTORIC PRESERVATION ACT, IN PERMITTING THE EXEMPT ABANDONMENT OF THE CANAL BRANCH OF THE BOSTON AND MAINE RAILROAD TO BECOME FINAL IN ACCORDANCE WITH 49 CFR § 1152.50

1. By allowing the exempt abandonment of the Canal Branch to become final on April 16, 1987 before it sought the comments of the Council pursuant to Section 106 and 36 CFR Part 800, ICC foreclosed the Council's opportunity to comment on abandonment of the Canal Branch as a whole.

2. The Council conditionally retains a reasonable opportunity to comment on the undertaking as it directly affects those properties along the Canal Branch right-of-way that are presently known to be eligible for the National Register, provided that ICC will: (a) impose a reasonable length of time (approximately up to 120 days) public use condition on the abandonment of the remaining unsold portion of the Branch; (b) extend the effective date of its November 25 decision concerning the abandonment for the period of the public use condition; and (c) consult with the Council's staff, the Connecticut State Historic Preservation Officer, and other interested parties to consider ways to preserve such properties through public use or other means.

3. In the event that ICC will take the actions identified in paragraph 2, this panel would suggest that the Council recommend mitigation actions to be taken by ICC, including but not limited to:

(a) marketing those portions of the Canal Branch not already disposed of, or if necessary, smaller portions of the Canal Branch containing historic properties, to public entities or others who will preserve them in appropriate contemporary use;

(b) marketing such sections subject to preservation restrictions;

(c) documenting historic properties prior to their demolition or disposition, in a manner consistent with the *Secretary of the Interior's Standards and Guidelines for Architectural and Engineering Documentation* (48 FR 44730-34); and

(d) ensuring consultation with the Connecticut State Historic Preservation Officer and other interested parties prior to the demolition of any historic property, and making possible the recovery of materials and data from any such property by or on behalf of such parties.

4. If ICC does not take the actions outlined in paragraph 2 within a reasonable length of time, the panel will reconvene to reconsider whether the Council's opportunity to comment has been foreclosed with respect to the undertaking's direct effects on those properties along the Canal Branch right-of-way that are presently known to be eligible for the National Register.

5. Because ICC's procedures for exempt abandonments (49 CFR § 1152.50) are presently not compatible with the timely consideration of effects on historic properties and appear likely to lead to "ministerial errors" like the one that occurred in this case, which may lead to foreclosure of the Council's opportunity to comment, ICC should immediately examine its procedures, in consultation with the Council's

staff and other interested parties, to improve coordination between those procedures and Section 106.

6. Because of the particular issues and complexities peculiar to this case the findings of this panel in paragraphs 1 through 4 are not to be taken as precedent for the findings of the Council with respect to other potential foreclosure situations.

No. 89-701

Supreme Court, U.S.
FILED
JAN 29 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

TUOLUMNE PARK and RECREATION DISTRICT, and FRIENDS OF SIERRA RAILROAD, INC.,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION, UNITED STATES OF AMERICA, and FIBREBOARD CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF OF PETITIONERS

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January 1990

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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---

REPLY BRIEF OF PETITIONERS

The Interstate Commerce Commission (ICC) unquestionably violated section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470f, and section 102 of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332, in the proceeding below. The *Federal Register* notice on which ICC relies to cut off judicial review for enforcement of NEPA and NHPA itself violates binding regulations issued under NEPA and NHPA requiring effective notice. ICC has conceded that the kind of "notice" afforded here was ineffective, and pervasively so. Pet. App. 59a-60a. Such a notice is contrary to 40 C.F.R. § 1506.6(b)(1), as expressly declared by the Coun-

cil on Environmental Quality (CEQ) at 46 Fed. Reg. 18037 (1981).[1] ICC's reliance on *Federal Register* notice also violated 36 C.F.R. § 800.5(b) as issued by the Advisory Council on Historic Preservation (ACHP).[2] It is perverse to claim that violations of NEPA and NHPA are shielded by a notice which itself violates NEPA and NHPA.[3] If this were the case, no one could ever obtain judicial review of notices violating NEPA and NHPA (or of other violations of NEPA and NHPA associated with illegal notices), because by definition no one would find out in time.[4]

ICC cites no case holding that a notice which violates NEPA and NHPA is insulated from judicial review, or

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[1] ICC cites no case holding that *Federal Register* notice is always adequate for purposes of compliance with (or putting "intervenors" on notice for purposes of) NEPA and NHPA.

[2] 36 C.F.R. § 800.5 requires ICC to provide the State Historic Preservation Officer or the Advisory Council on Historic Preservation with a determination of the effect that the abandonment will have on historic properties. These findings must be accompanied by documentation and must be made available to the public. The *Federal Register* notice contained nothing addressing these matters. Further, the notice which ICC claims it provided the State Historic Preservation Officer was similarly unlawfully lacking in any content.

[3] It is especially perverse for ICC to make this claim when it contends that ICC itself is not chargeable with knowledge of its own *Federal Register* notices about the rail line in question. Federal Resp. Opp. at 9 n.14 (to impute to ICC knowledge of what it puts in *Register* "would be an unrealistic and impossible burden").

[4] ICC claims that it served a notice on the California State Historic Preservation Officer (Fed. Resp. Opp. at 4), but ICC staff have indicated that the kind of notice involved (a general notice which did not indicate historic or environmental impacts) was inadequate to apprise relevant state officials. Pet. App. at p. 59a-60a (ICC memo conceding inadequacy of notice generally and in this particular case). The Court of Appeals for the District of Columbia Circuit specifically found that no reliance could be placed on the kind of "notice" ICC employed here. *Illinois Commerce Commission v. ICC*, 848 F.2d 1248, 1260 (D.C. Cir. 1988), *cert. denied*, 109 S.Ct. 783 (1989).

insulates the underlying proceeding from judicial review. *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 384-85 (1947), cited by ICC, predates both NEPA and NHPA and certainly did not involve this question. ICC evidently admits that statutes can require more than *Federal Register* notice (*see* Fed. Resp. Opp. at 10, citing *Matzke v. Block*, 732 F.2d 799 (10th Cir. 1984) and *Allison v. Block*, 723 F.2d 631 (8th Cir. 1983)), but then totally ignores our point that this is exactly what NEPA and NHPA require.[5]

ICC v. Brotherhood of Locomotive Engineers, 482 U.S. 270 (1987), is inapplicable. It did not involve an *ex parte* proceeding with illegal notice. Nothing in it suggests that the agency through unlawful notice can shield unlawful results reached in an *ex parte* proceeding.[6]

The Ninth Circuit erred when it held that unlawful notice was sufficient to shield an unlawful action from any judicial review. The Ninth Circuit's reliance on the unlawful notice is in direct conflict with the D.C. Cir-

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[5] Indeed, this Court has repeatedly emphasized the public notice and information dissemination purpose of NEPA. *E.g., Robertson v. Methow Valley Citizens Council*, 109 S.Ct. 1835, 1845 (1989); *Baltimore Gas and Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983).

[6] Although petitioners view *Brotherhood of Steam Locomotive Engineers* as totally inapposite simply on the notice issue, there is another grounds on which it is readily distinguishable. ICC contends that, under *Brotherhood of Locomotive Engineers*, a decision not to reopen is subject to judicial review only if based on new evidence and not on "material error." ICC suggests that it has only committed "material error" below. But the specific ICC regulation involved in this proceeding—49 C.F.R. § 1152.50 (1985)—states that the agency "shall reject" the exemption notice if it contains "false or misleading" information and its use "is void *ab initio*." The words "shall reject" and the expression "is void *ab initio*" are mandatory, not discretionary. The railroad's filing falsely and at least misleadingly asserted the property was "not suitable" for any public purpose. Under ICC's own regulation, the agency *must* reject the notice and reopen to the extent necessary to do so.

cuit's determination that the notice was legally deficient in *Illinois Commerce Commission v. ICC*, *supra*, 848 F.2d at 1260. The Ninth Circuit's ruling ignores binding regulations issued by CEQ and ACHP, as well as the principles of NEPA as declared by this Court. An agency, like a private citizen, should not be permitted to hide violations of law through procedures which violate the law. The petition for certiorari should be granted.

Respectfully submitted,

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January 1990